Supreme Court, U.S.
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No. _____

IN THE
# Supreme Court of the United States

RAYMOND BURNETT AND EVIE MOORE, *Petitioners*
*v.*

SONNIE E. POTTS, VIRGINIA S. POTTS, MARY MCGOWAN, LUCY DEPRIEST, THOMAS H. WARE, ADM'R., and PEGGY D. MATHES, GUARDIAN *ad litem* for Minors, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO
THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION OF TENNESSEE, IN NASHVILLE

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

**Question No. 1:** Under the basic language of the Due Process Clause of the Fourteenth Amendment forbidding a state's judiciary from taking property without due process of that state's law,[1] is it a violation thereof for state courts to deny claims of Petitioners—who were both heirs at law and beneficiaries under Decedent's first will—without trial on the merits before a jury as demanded, by the sequential steps of

> (a) entering a consent judgment approving a settlement (which required dismissal of all will contest claims) between two other groups of disputing relatives, each of which charged the other, and both of which were charged by Petitioners, with having Decedent under their influence and control when more recent wills favorable to the different groups were executed, where *(i)* there was well-established Tennessee law recognizing the right of any litigant to communicate to the judge his decision to withdraw from a settlement agreement and thereby deprive the judge of any power to enter a consent judgment, *(ii)* Petitioners had felt pressured to consent to the settlement but communicated to the judge knowledge of their withdrawal of their consent before the judge exercised the power to enter the consent judgment, *(iii)* at the settlement-approval hearing, no notice was taken of the existence of

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[1] As first expounded in *Dent v. West Virginia,* 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

state law entitling a litigant to withdraw from a settlement agreement and the judge refused to give Petitioners time to find other counsel, but entered final judgment making the settlement agreement the judgment of the Court without intervention of the demanded jury;

(b) the state's intermediate appellate court affirmed the judgment by inaccurately pretending that the judge had approved the settlement at an earlier stage at which, from the trial judge's own statements, the requisites for vesting of settlement approval authority plainly were not met; then

(c) that court refused to take any remedial action or enunciate any rationale attempting to justify its decision when it was brought to its attention by proper pleading that such was a forfeiture of property without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution, and finally

(d) the state's Supreme Court refused to review such alleged violation of federal constitutional prohibitions.

**Question No. 2:** When it is affirmatively demonstrated to an intermediate appellate court that its decision constitutes a judicial forfeiture of property in violation of the Due Process Clause of the Fourteenth Amendment, and the Court has not answered such insistence in its principal opinion, does the state judicial obligation to support the Constitution of the United States impose upon such appellate court a positive duty to correct its error?

## PARTIES

The names of all parties appear in the caption, except for the minor grand-niece and -nephew legatees, who are Sonnie Whitmore Potts, Erin Elizabeth Potts, Sonnie Levi Potts, Carol Ann Potts, Kevin Louis Ingram, Jr., Mary Madeline Ingram, James Tyrone Potts, Larry Rayborn McGowan, Jr., Brandon Seth McGowan, Annette DePriest, and Bruce Roberts, all represented by the Guardian *ad Litem*.

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## CITATION TO REPORT OF OPINION

The decision of the Tennessee Court of Appeals was rendered on February 25, 2004, *In re Estate of Erin Murray Jones,* Tenn.App., M.S. No. M2002-03073-COA-R3-CV, reported 2004 Tenn. App. LEXIS 126 (Copy printed *infra,* Appendix A, pp. App–1-App–11), Rehearing denied on March 29, 2004, reported *In re Estate of Erin Murray Jones,* 2004 Tenn. App. LEXIS 198 (Copy printed *infra,* Appendix B, pp. App–12-App–14), Application for permission to appeal was denied by the Supreme Court of Tennessee on December 5, 2004, *In re Estate of Erin Murray Jones* (Copy printed *infra,* Appendix C, pp App–16-App–18), a summary of the first paragraph of which was reported as *In re: Estate of Erin Murray Jones,* Supreme Court of Tennessee No. M2002-03073-SC-R11-CV, 2004 Tenn. LEXIS 1077.

## BASIS OF JURISDICTION

*(i)* The order of the Supreme Court of Tennessee was entered December 5, 2004, denying application for permission to appeal, which order imparted finality to the Opinion and Decision of the Tennessee Court of Appeals rendered February 25, 2004, Rehearing denied, March 29, 2004.

*(ii)* The statutory provision believed to confer on this Court

jurisdiction to review the judgment and orders in question is 28 U.S.C. Sec. 1257.

## CONSTITUTIONAL PROVISIONS AND STATUTES

*Constitution of the United States, Fourteenth Amendment, Section 1:*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*28 U.S.C. § 1257:*

**§ 1257. State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

## STATEMENT OF THE CASE

This case presents a Tennessee appellate judgment upholding a trial court's dismissal of a will contest without trial by entering final judgment on a consent agreement, finally agreed by less than all the parties. Petitioners invoked the Fourteenth Amendment's Due Process Clause in its basic definition, that it mandates that due process of Tennessee law be followed in deciding disputes governed thereby. Hence, they insist there is no need to invoke constitutional prohibitions in such cases until the state's judiciary has knowingly acted in violation of Tennessee law in determining litigation—until that point is reached, it is adequate simply to expound applicable Tennessee law with the expectation that the Court will follow the law.

This is stated because neither the trial court nor any of the attorneys gave any sign of knowledge that the Court's power to approve a settlement of litigation might be conditional upon a legal right of any party, initially agreeing to a settlement, to withdraw this consent. No party indicated any knowledge of—or brought to the attention of the trial court—the fact that there existed a body of Tennessee law[2] on the subject.

The first occasion to invoke the mandate that the "law of the Land" be followed by the judiciary came when Petitioners perceived that the Tennessee Court of Appeals had

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[2] None of the attorneys involved disputed Petitioners' appellate court assertion that their apparent ignorance of the existence of this body of law was due to their failure to research it (Appendix E, pp. App–79-App–80).

*knowingly* failed to follow that law. In calling this to the Court's attention by Petition for Rehearing (Appendix E), Petitioners insisted that unless corrected by it, such would achieve a judicial deprivation of property without due process of law in violation of the Fourteenth Amendment.[3] In applying to the Tennessee Supreme Court for permission to appeal the intermediate appellate judgment, Petitioners insisted both in the questions presented[4] and in the following discussion of legal

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[3] Before describing its failures to follow Tennessee law, Petitioners stated therein that "the sum total of their position is that the opinion does not comply with governing law, and if allowed to stand, will be a deprivation of their legal rights by Tennessee through actions of its judiciary other than by the law of the land and *without due process of law, contrary to the prohibitions of* Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and of *Section 1 of the Fourteenth Amendment to the Constitution of the United States."* (Appendix E, at App–61; emphasis added).

[4] "Whether, when a Petition for Rehearing under Rule 39(a), T.R.App.P. demonstrated that the Appellate Court's opinion was contrary to the law and did not accurately state the dispositive facts, *construction of that Rule's provisions in the light of the Constitutional prohibitions against judicial destruction of interests but* by the law of the land and *by due process of law,* Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and *Section 1 of the Fourteenth Amendment to the Constitution of the United States, or those Constitutional provisions themselves, impose a duty upon the appellate court to withdraw and correct such erroneous opinion."* (Appendix F, p. App–89; emphases added .)

reasons why they believed an appeal should be granted [5] that such decision affirming the trial court's dismissal without trial was a deprivation of rights without due process of law, contrary to the Fourteenth Amendment. Neither of these appellate courts made any comment acknowledging recognition that constitutional questions had been raised,[6] or sought to show some rational defect in Petitoners' demonstration that the intermediate appellate court failed to follow the governing Tennessee law.

The trial judge had acted also as "settlement judge" with all parties consenting to this departure from normal procedure. Unquestionable Tennessee law—which the Tennessee Court of Appeals pretended to follow by its citations—may most easily

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[5] "But when the requirements of law are called to an appellate court's attention, it is that court's obligation to follow the law. To decide contrary to law is to fail to fulfill the first obligation of every judge at every level of the judicial system: *To follow the law and to avoid depriving litigants of their rights* other than by the law of the land and *without due process of law, contrary to the prohibitions* of Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and of Section 1 *of the Fourteenth Amendment to the Constitution of the United States.*" (Appendix F, at App–101; emphases added).

[6] The Tennessee Supreme Court's denial of an application for permission to appeal implies approval of the intermediate appellate decision unless the Supreme Court, as it often does, states that its denial of the application is an approval of only the results of the appellate decision, which rejects the appellate decision's stated rationale.

be made clear by reference to two recent decisions.

The first is *Harbour v. Brown,* 732 S.W.2d 598 (Tenn., 1997), holding that because a court speaks only through its minutes, it has no jurisdiction to enter a consent decree unless all parties are in agreement at the moment it enters judgment, so that any consenting party can withdraw before then. The second is *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.,* 27 S.W.3d 530 (Tenn.App., M.S., 2000; App.den. 2000), which summarized Tennessee law following its Supreme Court's promulgation of a new rule on participation of judges in mediated settlements. It held that although a pre-judgment agreement may become binding upon receiving judicial sanction **in open court,** after detailed recitation of the agreement to the judge and written preservation of its terms, a judge sitting as a settlement judge could not approve a settlement because such approval could only be in open court[7] by a judge then sitting as trial judge, not as a mediator, even if the mediation occurred in the settlement judge's open courtroom.

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[7] Although *Harbour* in two places stated that consent to a settlement agreement could be withdrawn at any time before the entry of judgment, it also quoted the "general rule" from *Corpus Juris Secundum* that withdrawal of consent could only be effective if communicated on one of two deadlines, entry of judgment or the earlier time of the agreement's receipt of judicial sanction in open court. A subsequent intermediate appellate decision used the encyclopedic reference in *Harbour* to hold that where there had been open-court sanction, a party couldn't withdraw his consent even before judgment was entered, *REM Enterprises v. Frye,* 937 S.W.2d 920 (Tenn.App., E.S., 1996, App.den. 1997).

The briefest *detailed* description of the dispositive facts is set out in the Application for Permission to Appeal to the Tennessee Supreme Court (Appendix F, at App–86-App–93), but a more concise time-sequence summary follows: The Probate Court held a settlement conference among all parties on October 21, 2002, and all parties except these Petitioners' attorney—who stated he lacked authority to agree—indicated that they had reached an agreement whose precise terms were worked out over the next 10 days.[8] Petitioners' attorney obtained their reluctant agreement on October 22, 2002 and telephonically informed the judge, who then telephoned other attorneys in the case, acknowledging that he had still been acting only as "settlement judge" (Tr., pp. *10, *11, Appendix G, pp. App–112-App–113). Petitioners informed the Court on Friday, November 1, 2002 (as recognized by the Supreme Court in its Order denying the Application to Appeal, Appendix C, at App–16) that they were withdrawing their consent to the agreement. Communication was by their counsel's motion to withdraw because Petitioners had revoked their consent to the settlement agreement.

After such consent was withdrawn, the Probate Court held its open court hearing on November 4, 2002, during the course of which it approved the settlement over Petitioners' objections. For the most part, the settlement essentially split the estate almost equally between the two hardest-fighting groups of beneficiaries, each of whom had been charged with having the decedent under their undue influence. These petitioners were thereby disinherited and the earliest will—proferred only by them to be probated during the course of the will-contest

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[8] Representations of the Settling parties' principal attorney in open court (Transcript, p *6, Appendix G, p. App–110).

trial—was thereby nullified *without any trial,* although they were never charged with having exercised such undue influence over the decedent, and no party ever questioned the initial validity of the early will so offered.[9] Petitioners *never* signed the settlement agreement, some parties did not sign it until the day the judge announced approval of the agreement in open court, November 4, 2002, after petitioners had withdrawn their consent (Appendix D, pp. App–44-App–57), the agreement was not presented to the judge before he stated his approval (Appendix G, App–130)[10] and the judgment approving the settlement was not signed and entered until November 14, 2002 (Appendix D, p. App–21). Hence, these two groups, each charged with having illegally controlled the decedent, split the

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[9] As explained to the Court of Appeals in the Petition to Rehear, the 1974 will was "left on the courtroom table, properly offered for probate, with its beneficiaries entitled to trial by jury to determine its validity, yet it is given no recognition whatever, although its validity at the moment of execution is not denied by any party and there is a distinct possibility that it still stands unrevoked." (Appendix E, pp App–65-App–66); with explanation of why that will might still be valid *(Ibid.,* pp. App–81).

[10] After the judge had orally stated his approval of the settlement, whose terms were not stated in open court, the Guardian *ad litem* said, in part, "I would move that an agreement stated to you by counsel for all interested parties be made an order of the Court, and therefore you don't need the signatures of everyone involved since it's before the Court. *And I'm sure Mr. Day has [*38] the original."* (App–130; emphasis added).

estate mostly between themselves, and this arrangement became the judgment of the Probate Court without trial.

The Opinion of the Court of appeals sought to justify the Probate Court's order as lawful by inaccurate statements of the record: Recognizing the rule generally is that "the court cannot enter a consent agreement if a party withdraws his consent and communicates his withdrawal to the court before the court enters a judgment . . ." (Appendix A, p. App–7), and that withdrawal attempts are invalid when "the terms of the agreement were presented *in open court or hearing*, are on the record, . . . if the parties agreed to them *at the time the agreement was sanctioned by the court,* notwithstanding *subsequent attempts to withdraw." (Ibid.,* App–8; emphasis added), the Court misstated the record by implying that the Probate Court sanctioned the agreement on October 22 (when there were no open-court proceedings) by its stated assumption that Petitioners "understood and consented to the terms of the settlement agreement . . . at the time it was sanctioned by the court." *(Ibid.,* App–9).

The opinion achieved this misstatement by omitting mention of the facts that the probate judge was only acting as settlement judge on October 22, when there were no courtroom proceedings, when nothing happened that day but telephone calls (Appendix G, App–123) and when the record proves beyond dispute that the judge began the November 4 hearing by considering the motion of Petitioners' counsel to withdraw *(ibid.,* App–108) *because of* Petitioners' withdrawal of their consent to the settlement *(ibid.,* App–121),[11] while the Court

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[11] "THE COURT: Mr. Smith is a very capable lawyer and he's been in some tough **[*24]** cases before. Mr. Smith has

was still considering whether to approve the settlement in the November 4 hearing, after gaining knowledge of Petitioners' withdrawal of their consent on November 1 *(Ibid.,* App–122),[12] and when the trial Court finally concluded by declaring, "I've got other cases that I now agreed to hear today, **I am establishing** that this case is settled." *(Ibid.,* App–123; emphasis added). The appellate opinion's necessary implication that the telephonic occurrences on October 22 met the stringent requirements for court sanction of a settlement set out in the Opinion's quotations in the preceding paragraph simply have no support in the record, but are contradicted by it.

## REASONS FOR ALLOWING THE WRIT

This case involves two absolutes in the concept of due process of law: The first is the prohibition of a state's forfeiture of property rights without a hearing on the merits,*Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Grannis v. Ordean,* 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), *Armstrong v. Manzo,* 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). As already noted *(supra,* Question No. 1, p. *i,* n. 1), the second is the basic common-law meaning of due process of law, being that government, principally the courts, must follow applicable law when taking

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put on the record that the reason he needs to get out is because you authorized him to convey a settlement, he conveyed the settlement, you've now told him to withdraw it." (Addressing Petitoner Burnett).

[12] "THE COURT: . . .I'm trying to figure out do we have a settlement. I believe we do unless anyone else objects."

life, liberty or property.[13] Upon its incorporation into the Fourteenth Amendment, this had the core meaning that each state must accord *due process of state law* in inflicting such deprivations, *Dent v. West Virginia,* 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908).

Tennessee law provides for a jury trial of will contest cases, and the only reason Petitioners' contest was dismissed without any trial was a trial court's unthinking assumption (to which counsel for all respondents assented) that just because all parties had at one time agreed to settlement without trial, the court thereby became empowered to later dismiss the case without trial even when some parties had withdrawn their consents. *E.g.,* the judge and participating lawyers showed by their statements and actions that they did not know that Tennessee law denies every judge the authority to judicially sanction a settlement negotiated by parties *after* the judge has been informed that some parties have withdrawn their consent to the agreement *(Supra, Statement of the Case,* p.6). Ignorance

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[13] This is supported by the latest pre-Revolutionary War common-law authority widely accepted in America, Blackstone, who wrote under the heading "The Courts: due process of law": "It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament." I BLACKSTONE, COMMENTARIES, § 197, pp.*141-*142 (Jones ed., 1915).

of the law is the most understandable reason for a *trial court* to decide contrary to the law.

When a case reaches the appellate level, and the content of law not followed by a trial court is brought to the attention of the appellate court by briefing and argument, then the obligation of the appellate court is to consciously and deliberately follow the law, in the actual judicial thinking process used to arrive at decision of the issues, as so well described by Chief Justice Marshall.[14] When appellate judges fail to do this, then the state, through their action, has destroyed rights without due process of law.

An appellate court's failure to follow the law, when a written opinion is issued as customary in appellate practice, is unavoidably discernable by litigants and their counsel from great familiarity with both facts and the authorities dug out and studied in the procedure. This is a judicial wrong whose occurrence is believed from experience and observation to be

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[14] "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, *a discretion to be exercised in discerning the course prescribed by law;* and, when that is discerned, *it is the duty of the Court to follow it.* Judicial power is never exericised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. Bank of the United States,* 22 U.S. 738, 866, 6 L. Ed. 204, 234 (1824).

far more common than generally suspected, yet one almost impossible to remedy as a practical matter. It is an evil that should be remedied by the judiciary. It calls out for this Court's attention and the tutorial benefit of its wisdom expressed in an opinion to be invoked with effect within the states' appellate judiciaries and even among the federal courts of appeals.

Whenever a state appellate court has a result-oriented drive—conscious or sub-conscious—to arrive at a decision for one party or another in determining litigation, this is an evil that appears to be without practical remedy unless it is available within the offending judiciary's appellate structure.

A Federal right should have a Federal remedy, but the Federal trial courts are mostly unable to remedy this evil, either because of the *Rooker-Feldman* rule that this Court's jurisdiction to review final state-court judgments is exclusive, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362, (1923)[15] and *District of Columbia Court of Appeals v. Feldman*, 160 U.S. 462, 103 S. Ct. 1303, 75 L. Ed.2d 206 (1983), or by abstention, out of comity considerations, from exercising jurisdiction over cases that draw into question the legitimacy of ongoing state-court actions within their subject-matter jurisdiction, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, (1971), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196-197, 105 S. Ct. 3108, 3122, 87 L. Ed. 2d 126, 145 (1985), *Pennzoil v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed.

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[15] Based upon a record establishing there was a final judgment "wherein the circuit court had jurisdiction of both the subject matter and the parties . . ." (263 U.S., at 415, 44 S. Ct., at 150, 68 L. Ed., at 365).

2d 1 (1987). Experience in litigation has shown that Federal trial courts are prone to abstain rather than furnishing protection against non-final[16] state judicial abuses, when a state court has subject-matter jurisdiction, even though its judgment is void under state case-law because of legal limitations on the remedy the state court can order.[17]

Obviously, the only other available remedy is that invoked here, a petition to this Court. Because of the demands on this Court's time, such is not even a *possible* appellate remedy of first resort after the appellate judicial infringement

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[16] That is, non-final in the sense that they are interlocutory or not yet subjected to appellate review.

[17] Tennessee judgments are void when they exceed scope of judgment authorized by law, *City of Bluff City v. Morrell,* 764 S.W.2d 200 (Tenn., 1988) (holding a final consent judgment, long closed, to be void and still subject to trial in a municipal annexation contest case where it exceeded the court's statutory jurisdiction, which was only either to declare the annexation valid or invalid); *Brown v. Brown,* 198 Tenn. 600; 281 S.W.2d 492 (1955)(alimony decree void where divorce was awarded to the husband at a time when alimony award was authorized only when the wife was granted a divorce). So in Tennessee, it has long been recognized Tennessee law that when a will is admitted to probate, the court has no power to order distribution in any manner different from that provided by the will, except with the consent of all parties, *In re Wooten's Estate,* 114 Tenn. 289, 85 S.W. 1105 (1904), yet the distribution ordered here was totally different from that provided by *any* will or by the law of intestate succession.

of due process prohibitions has occurred.

But Petitioners insist that when all state appellate judges are required to be bound by oath to support the Constitution, and it is pointed out to them by *serious and meritorious* petition for rehearing that due process of state law has not been followed, because *the court misstated either the law, the facts, or both,* either by omission or by affirmative misstatement, then the mandated duty to give supremacy to the Constitution should obligate such appellate judges to demonstrate that their highest loyalty is to the Constitution rather than to their own desires as to the preferred outcome of the litigation, or even shielding the initial opinion from open exposure of its errors. This is simply another clear application of the rationale stated in *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803). It should be recognized as a duty imposed by the Constitution itself regardless of the verbiage of different states' procedural rules, mostly imitating the Federal Rules of Civil Procedure.

To grant this enforcement to Constitutional rights would require very little labor for this Court: It would *never* require decision on the merits of state law, but simply a demonstration that the intermediate appellate opinion either misstated the facts or misstated state law, an order vacating that decision, and a remand with instructions to re-decide the case by an opinion that accurately and fully states the law and the facts to the extent necessary to demonstrate that the decision is one required by law. This would not demand a long series of decisions, nor frequent re-visitations of the same issue, but only one clear opinion by this Court. This would be a guiding light to state appellate courts, both intermediate and those of last resort.

The crying need for such an opinion by this Court is demonstrated by the fact that although all states recognize the

propriety of rehearing petitions, a computer word search reveals no appellate opinion by any American court of last resort expounding the *duty* imposed upon an appellate court to act upon a meritorious rehearing petition that accurately identifies misstatements or misconceptions of law or fact which render the opinion improper.

An appellate decision that falsifies facts, or refuses to take notice of long-established rules of law that dictate a different result is merely a decision of a fictitious dispute, not the actual one, as a ploy to make the law subservient to individual judicial will. Constitutional protections are worthless unless they are made real by dedicated judicial enforcement. When the minds of state appellate judges are proven by their opinions to be closed to dispositive factual or legal points that dictate a contrary decision, or when the opinion fails to address valid arguments presented by the losing party which, if correct, would require a different result, this can only be a failure to follow the law.

A litigant can seldom know the cause of such appellate judicial shortcoming. It conceivably could be caused by favoritism toward a philosophical view, affinity or dislike for one of the parties or attorneys, a mental block caused by an inability to seriously consider an unpopular view, an inability to accept the fact that a highly-reputed trial judge could be so extremely wrong, or even by a practice of voting on the *outcome* of an appealed case and then using the winning party's brief—with any legal or factual inaccuracies it may contain—as the basis for opinion writing.

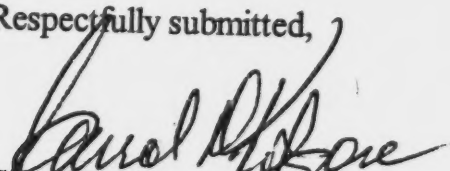
When an opinion appears unexceptional, with its writer attempting to demonstrate its correctness, the only possible way such infidelity to law or factual record can be shown is by considering the opinion in comparison with the briefs which led

to the opinion. This is believed to be a serious and common failing of the judiciary, best remedied by the restrained application of judicial power.

The only way its scope can be determined and combated is by an opinion of this Court, with constitutional foundation, demonstrating that when the petition proves that the opinion misstated facts or law, action upon a petition to rehear is not a prerogative, regal in nature, but is a duty to remedy a judicial wrong achieved by a decision contrary to the law of the land.

WHEREFORE, Petitioners respectfully pray that the Writ of *Certiorari* issue to the Tennessee Court of Appeals for the Middle Section of Tennessee for review of the issues here presented.

Respectfully submitted,



Carrol D. Kilgore
BRANSTETTER, KILGORE, STRANCH & JENNINGS
227 Second Ave., No., Fourth Floor
Nashville, TN 37201-1631
(615) 254-8801

# Appendix A
# Decision of the Tennessee Court of Appeals

**IN RE: ESTATE OF ERIN MURRAY JONES**

**No. M2002-03073-COA-R3-CV**

**COURT OF APPEALS OF TENNESSEE, AT NASHVILLE**

***2004 Tenn. App. LEXIS 126***

**November 5, 2003, Session**
**February 25, 2004, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by *In re Estate of Jones, 2004 Tenn. App. LEXIS 198 (Tenn. Ct. App., Mar. 29, 2004)*

**PRIOR HISTORY:** [*1] Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed. Direct Appeal from the Circuit Court for Davidson County. No. 98P-1344. Frank G. Clement, Jr.

**DISPOSITION:** Judgment affirmed.

**LexisNexis(R) Headnotes**

**COUNSEL:** Carrol D. Kilgor, Nashville, Tennessee, for the appellants, Raymond Burnett and Evie Moore.

John A. Day, Rebecca C. Blair and Vincent Zuccaro, Brentwood, Tennessee, for the appellees, Sonnie E. Potts and

Virginia S. Potts.

Michael H. Johnson, Nashville, Tennessee, for the appellant, Mary McGowan.

Jerry Scott, Murfreesboro, Tennessee, for the appellee, Lucy DePriest.

Peggy D. Mathes, Guardian Ad Litem, Nashville, Tennessee, for the appellees, minor children.

William L. Harbison, Mark T. Smith, Nashville, Tennessee, for the appellee, Kimberly Ingram.

**JUDGES:** DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

**OPINIONBY:** DAVID R. FARMER

**OPINION:**

This appeal is from a will contest. The trial court entered judgment according to the terms of a settlement agreement between the parties. Appellants contend they withdrew their agreement to the settlement before approval of the agreement by the trial court. **[*2]** They accordingly submit the agreement is not enforceable. We affirm judgment of the trial court enforcing the terms of the settlement agreement.

Decedent Erin Murray Jones (Ms. Jones) died in August 1998, leaving an estate of over $ 8 million and five wills executed over a period of twenty-four years. Ms. Jones executed a holographic will in January 1998; identical wills dated June 4,

1996, and October 28, 1996; a will dated 1993; and a will dated 1974. Ms. Jones never married, and left no children. Her heirs at law were her twelve surviving nieces and nephews.

In September 1998, Ms. Jones' heirs and potential beneficiaries under will began this feud over her money, which, unfortunately, she did not take with her. In September 1998, the 1996 wills were offered for probate by nieces Mary McGowan and Lucy DePriest. Next of kin and beneficiaries named in the will were served with notice. Over the next four years, Ms. Jones' heirs waged a protracted and acrimonious battle over which of the five wills was valid.

In November 1999, the court entered default judgments against heirs and legatees who failed to appear or take action in this case, including Appellants (who are brother [*3] and sister), their brother, John Burnett, and Kimberly Ingram (Ms. Ingram). In December 1999, Appellants, Mr. Burnett, and Ms. Ingram moved the court to set aside the default judgment. The trial court granted their motion in July 2000.

In April 2002, John Clemmons, then counsel for Appellants, filed a motion to withdraw as counsel for Ms. Ingram based on a conflict of interest. Upon motion of Ms. Ingram, he was later disqualified as counsel for Appellants. The matter was scheduled for trial on November 2, 2002. A pre-trial conference was scheduled for October 21, 2002. On October 18, counsel for Ms. Ingram notified the court that all parties except Appellants had reached a compromise agreement, and the pretrial conference was converted to a settlement conference by agreement of the parties. On October 22, Roger Smith (Mr. Smith), counsel for Appellants, notified the court that Appellants had accepted Appellees' offer to settle the case. Under the settlement agreement, Appellants receive $ 15,000 each.

Appellants subsequently withdrew their agreement to the settlement, however, and on November 1, Mr. Smith, filed a motion to withdraw as counsel, stating as grounds Appellants' withdrawal **[*4]** of consent to the settlement. The court held a hearing on Mr. Smith's motion and Appellees' motion to enforce the settlement agreement on November 4. Appellant Raymond Burnett (Mr. Burnett) attended the November 4 hearing and reaffirmed Appellants' withdrawal from the settlement agreement. Mr. Burnett stated that Appellants continued to assert the validity of Ms. Jones' 1974 will. Under this will, Appellants each would receive approximately two percent of Ms. Jones estate.

At the November 4 hearing, the court granted Mr. Smith's motion to withdraw and also granted Appellees' motion to enforce the settlement agreement. The trial court remarked, "there is no question in my mind that this contest of wills was settled almost two weeks ago . . . on Tuesday, October the 22nd." The court noted, "I believe that there was a settlement through a judicially sanctioned settlement conference. . . . The court acted in reliance upon the settlements communicated." The court asked Mr. Burnett whether Mr. Smith had spoken with Appellants about the settlement agreement, and whether they and Mr. Smith had discussed "the pros and cons." Mr. Burnett testified that they had agreed, but had only one night **[*5]** to consider the offer. Mr. Burnett requested that the court allow Appellants to obtain new counsel and reschedule the matter.

At the hearing, the trial court heard proof regarding the validity of the 1998 will and admitted that will to probate subject to the provisions of the settlement agreement. On November 14, 2002, the trial court entered judgment admitting the 1998 will to probate and ordering Ms. Jones' estate

distributed according to the terms of the settlement agreement.

***Issues Presented***

The issues raised in this appeal, as we slightly restate them, are:

(1) Whether the trial court erred by entering judgment pursuant to the settlement agreement where Appellants withdrew their agreement to the settlement.

(2) Whether the trial court erred by disqualifying Appellants' first counsel, John Clemmons, due to a conflict of interest.

(3) Whether the trial court erred by applying the Tennessee Rules of Civil Procedure regarding default judgments for non-appearance in a statutory will contest.

***Standard of Review***

The issues raised in this appeal are issues of law. Our review of a trial court's determinations on issues of law is *de novo*, with no **[*6]** presumption of correctness. *Bowden v. Ward, 27 S.W.3d 913, 916 (Tenn. 2000).*

***Entry of Judgment on Settlement Agreement***

The pivotal issue before this Court is whether the settlement agreement entered into by the parties was enforceable. Appellants contend they withdrew their agreement to the settlement before it was approved in open court, and that the settlement agreement accordingly was not enforceable. They further argue that, since intestate succession is possible in this case, the consent of heirs at law not participating in this lawsuit is required for distribution other than by intestate succession or provisions of a valid will. Appellees argue that the trial court

sanctioned the settlement agreement prior to Appellants' attempt to withdraw their consent. They contend the agreement accordingly was enforceable.

We first address Appellants' argument that the settlement agreement is not enforceable because it was not joined by all potential heirs at law, but only the parties to this litigation. Intestate succession is the default result absent a valid will. The trial court admitted to probate Ms. Jones' most recent will, the 1998 will, subject to **[*7]** the compromise reached by the parties. Other potential heirs at law simply have not contested the validity of this will, and are not parties to this lawsuit. This argument is without merit.

We turn next to whether the trial court erred by enforcing the terms of the settlement agreement notwithstanding Appellants' subsequent withdrawal. Appellants cite *Harbour v. Brown for Ulrich, 732 S.W 2d 598 (Tenn. 1987)*, for the proposition that the settlement agreement is not enforceable because they withdrew their agreement prior to approval of the agreement by the trial court. A consent judgment does not reflect the judgment of the court, but merely an agreement between the parties to a lawsuit which has been placed into the record by the court. *Harbour, 732 S.W.2d at 599*. Therefore, although the courts encourage parties to resolve disputes by agreement, generally, the court cannot enter a consent agreement if a party withdraws his consent and communicates his withdrawal to the court before the court enters a judgment. *Id.* The compromise agreement may be enforceable as a contract, but it may not be entered by the court as a judgment when the court knows **[*8]** it has been repudiated by one of the parties. *Id.*

In making this determination, the *Harbour* court quoted 49 C.J.S. *Judgments* § 174(b), which reads: as follows:

The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court *or* is rendered and promulgated as a judgment.

*Id.* (emphasis added). Accordingly, in *Rem Enterprises, Ltd. v. Fry*, this Court recognized an exception to the general rule. *Rem Enterprises, Ltd. v. Frye, 937 S.W.2d 920, 922 (Tenn. Ct. App. 1996)*(perm. app. denied). In *Rem Enterprises*, we distinguished *Harbour*, where the settlement agreement had not been read in court and had not been made part of the Technical Record. *Id.* We held that under the circumstances presented in *Rem Enterprises*, where the terms of the agreement were read in open court and the chancellor asked the parties whether they consented to the agreement, the agreement was enforceable notwithstanding subsequent disavowal by the appellant. *Id.*

Thus, under the proper circumstances, a trial court may enter an agreed order notwithstanding **[*9]** the withdrawal of consent by one of the parties before entry of the judgment. *Environmental Abatement, Inc. v. Astrum R.E. Corp., 27 S.W.3d 530, 538-39 (Tenn. Ct. App. 2000)*(perm. app. denied). Such circumstances exist at least where the terms of the agreement were presented in open court or hearing, are on the record, and where the terms have been accepted by the court and made part of the record. *Id.* In such cases, the terms of a settlement agreement may be enforceable if the parties agreed to them at the time the agreement was sanctioned by the court, notwithstanding subsequent attempts to withdraw. *Id.*

In the present case, Appellants were not present when the settlement offer was made on October 21, 2002, but were represented by counsel, Mr. Smith, who communicated the settlement offer to Appellants. Appellants accepted the

settlement offer, agreeing to settle for a total of $ 30,000. On October 22, 2002, Mr. Smith communicated their acceptance to opposing counsel and to the trial court. The trial court conferred with counsel for the parties, and confirmed that the matter was settled. The settlement agreement is included in the Technical Record, and clearly **[*10]** was sanctioned by the court prior to withdrawal by the Appellants. Further, at the November 4 hearing, Appellant Raymond Burnett testified that Appellant and Mr. Smith had discussed the agreement, and that Appellants had given their consent to it.

Appellants clearly understood and consented to the terms of the settlement agreement, which is memorialized in the Technical Record, at the time it was sanctioned by the court. We accordingly affirm entry of judgment pursuant to the terms of the agreement as entered by the trial court.

***Disqualification of Counsel***

Appellants contend the trial court erred by permitting John Clemmons to withdraw as counsel from this lawsuit. Mr. Clemmons initially represented Appellants and Ms. Ingram in their motion to set aside the default judgment entered against them in November 1999. In April 2002, Mr. Clemmons withdrew as counsel for Ms. Ingram based on a conflict of interest between Ms. Ingram and Appellants. The trial court then granted Ms. Ingram's motion to disqualify him as counsel for Appellants. In their brief to this Court, Appellants argue Mr. Clemmons faced not a conflict of interests, but a conflict of "objectives or loyalties, " **[*11]** and accordingly should not have been permitted to withdraw as counsel.

Upon review of the record, we agree with Appellees that Appellants are arguing semantics. Appellants, Ms. Ingram, and the other parties to this action have altered their positions

regarding which will to advocate according to individual mixed objectives. Once Ms. Ingram's interests, or objectives, diverged from Appellants, Mr. Clemmons was faced with a professional conflict. He could not simultaneously advocate the validity of different wills. We affirm judgment of the trial court on this issue.

***The Default Judgment***

Appellants contend the trial court erred by entering a default judgment against them in November 1999. The trial court set aside this judgment in July 2000, however. Thus any error, if such error indeed occurred, was harmless. This issue is pretermitted.

***Conclusion***

We affirm the judgment of the trial court in all respects. Costs of this appeal are taxed to the Appellants, Raymond Burnett and Evie Moore, and their surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

# Appendix B
# Decision of the Tennessee Court of Appeals Denying Rehearing

**IN RE: ESTATE OF ERIN MURRAY JONES**

**No. M2002-03073-COA-R3-CV**

**COURT OF APPEALS OF TENNESSEE, AT NASHVILLE**

***2004 Tenn. App. LEXIS 198***

**March 29, 2004, Filed**

**NOTICE:** [*1] DECISION WITHOUT PUBLISHED OPINION

**PRIOR HISTORY:**

Circuit Court for Davidson County. No. 98P-1344. *In re Estate of Jones, 2004 Tenn. App. LEXIS 126 (Tenn. Ct. App., Feb. 25, 2004)*

**JUDGES:** DAVID R. FARMER, JUDGE, ALAN E. HIGHERS, JUDGE, HOLLY M. KIRBY, JUDGE.

**OPINION:**

ORDER

Appellants Raymond Burnett and Evie Moore have filed a petition **[*2]** for rehearing pursuant to Rule 39 of the

Tennessee Rules of Appellate Procedure. After due consideration, the petition is denied. Costs are taxed to the petitioners, Raymond Burnett and Evie Moore, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

ALAN E. HIGHERS, JUDGE

HOLLY M. KIRBY, JUDGE

**PUBLISHER'S NOTE:**

ORIGINAL PAGINATION IS NOT CONTINUOUS

# Appendix C
# Decision of the Supreme Court of Tennessee Denying Appeal

FILED
Dec. 5, 2004
Clerk of the Courts
Rec'd by _____

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: ESTATE OF ERIN MURRAY JONES**

**Probate Court for Davidson County**
**No. 98P-1344**

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**No. M2002-03073-SC-R11-CV**

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## ORDER

Upon consideration of the application for permission to appeal filed on behalf of Evie Moore and the record before us, the application is denied.

The appellants, Raymond Burnett and Evie Moore, have filed a "Motion to Require Respondents to Correct Errors in Their Answer in Opposition to Appeal Application." Appellees admit that the appellants correctly point out that Mr. Smith filed his motion to withdraw from this case which stated that Mr. Burnett had withdrawn consent to the settlement agreement on November 1, 2002, not November 3, 2002. However, the appellees are correct in their assertion that the matter was set for trial on November 4, 2002, not November 6, 2002, as the appellants claimed. The motion is granted; however, since both parties are correct in part and incorrect in part, costs incident to

this motion are taxed equally to the parties.

PER CURIAM

# Appendix D
# Final Probate Court Judgment

**FILED**
2002 Nov. 14 AM 11 44
RICHARD R. ROOKER, Clerk
_____, D.C.

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON
(PROBATE DIVISION)

IN RE: )
)
THE ESTATE OF )
ERIN MURRAY JONES )
) No 98P-1344
)

**FINAL ORDER DISMISSING WILL CONTEST**

The contest of the following five wills of Erin Murray Jones came for *trial* on November 4, 2002 at 9:00 am.: the January 12, 1998 holographic will offered for probate by Sonnie B. Potts and Virginia S. Potts; the June 4, 1996 will offered for probate by Mary McGowan and Lucy DePriest; the October 28, 1996 will offered for probate by Mary McGowan and Lucy DePriest, the May 3,1993 will offered for probate by Sonnie E. Potts; and the March 5, 1974 will offered for probate by Raymond Burnett. This case was set for trial by agreement by Order of the Court entered May 7, 2002.

All interested parties were given notice of the trial and had an opportunity to be present and participate. Appearing in Court on the day of trial were John A. Day, Rebecca C. Blair,

and Vincent Zuccaro on behalf of Sonnie B. Potts and Virginia S. Potts; Michael Johnson on behalf of Mary McGowan; Jerry Scott on behalf of Lucy DePriest; Peggy Mathes as guardian *ad litem* on behalf of the minor children Sonnie Levi Potts, Carol Ann Potts, Kevin U. Ingram, Jr. and Mary Madeline Ingram; William L. Harbison and Mark Smith on behalf of Kimberly Ingram; and Roger Smith on behalf of Raymond Burnett and Evie Moore. Raymond Burnett was also present and gave testimony and arguments to the Court on his own behalf John Clemmons, former counsel for Raymond Burnett, John Burnett, Evie Moore and Kimberly Ingram was present. Tom Ware was present as Administrator *Pendente Lite*. Neither Evie Moore, a contestant of the 1998, 1996, and 1993 wills, nor any other person was present. The Court had previously served as settlement judge with the approval of all parties. On October 21, 2002 the Court conducted a settlement conference which resulted in all parties agreeing to the terms of the Estate Settlement Agreement.

The Court began by hearing argument on Roger Smith's motion to withdraw as counsel of record for Raymond Burnett and Evie Moore. Roger Smith explained that Raymond Burnett and Evie Moore agreed to accept $30,000 collectively toward their attorneys' fees in thE and final settlement of their claims against the Estate of Erin Murray Jones and, with their authority, Mr. Smith conveyed Ms. Moore's and Mr. Burnett's acceptance of that offer to the Court and also to Mr. Day as a representative of the counsel for the other litigants. Roger Smith further explained that Raymond Burnett and Evie Moore have now instructed him to attempt to withdraw their acceptance of that offer. Roger Smith moved the Court for permission to withdraw as counsel of record for Raymond Burnett and Evie Moore because of their decision to attempt to withdraw their agreement to the settlement reached by all

parties.

The Court next heard testimony and argument from Raymond Burnett, under oath, on the issue of whether to enforce the settlement agreement of Evie Moore and Raymond Burnett with the other parties and the issue of whether to grant Roger Smith's motion to withdraw. Mr. Burnett confirmed under oath that he and Ms. Moore accepted the offer of 530,000 collectively toward their attorneys' fees and instructed Mr. Smith to communicate their acceptance of that offer to other counsel and to the Court. Mr. Burnett did not oppose Mr. Smith's motion to withdraw.

[2]

After considering the arguments of Roger Smith and Raymond Burnett, the motion tiledby Mr. Smith, the arguments of John Day and the entire record as a whole, the Court finds as follows:

Roger Smith's motion to withdraw as counsel of record for Raymond Burnett and Evie Moore is GRANTED. The Court further finds that there is no dispute that Evie Moore and Raymond Burnett agreed to accept in full and final settlement of their claims in this action the sum of $30,000 collectively to be paid from the Estate toward their attorneys' fees, and that this agreement is an enforceable settlement agreement, having been presented to and accepted by the trial Court on October 22, 2002. The Court also finds that the settlement agreement is an enforceable contract between the parties and is binding upon them without the signatures of Raymond Burnett and Evie Moore. Therefore, the request of Raymond Burnett and Evie Moore to withdraw their consent to the settleincnt agreement is **DENIED.**

The Court next proceeded with the trial of this cause consistent with the settlement agreement of the parties and took proof on the validity of the January 12, 1998 holographic will (a copy of which is attached hereto as Exhibit A). The Court heard testimony from Laura Roberts and Joyce Payne, under oath, both of whom testified to their familiarity with Erin Murray Jones and her handwriting. Both witnesses reviewed the original holographic will dated January 12, 1998, testified that all provisions of that will are in the handwriting of Erin Murray Jones and further that the will was signed by Ms. Jones. Ms. Payne and Ms. Roberts also testified that, in their opinions, Erin Murray Jones was of sound mind on January 12, 1998. Counsel for all other parties, as well as Mr. Burnett, were given the opportunity to cross-examine both witnesses and did not do so. Likewise, counsel for all parties and Mr. Burnett were given the opportunity to submit counter-proof and did not do so. Based upon the foregoing testimony, which the Court finds credible, the

[3]

settlement agreement of the parties and the entire record in this cause, the Court finds that the Petition to Probate the January 12, 1998 holographic will of Erin Murray Jones is GRANTED and that will shall be **ADMITTED** to probate in solemn form, subject to the settlement agreement ofthe parties and plan of distribution set forth therein.

It is further ORDERED, ADJUDGED, and DECREED as follows:

1. The Estate Settlement Agreement is hereby, in all respects, approved.

2. Thomas Ware shall continue as the Administrator

C.T.A. of the Estate of Erin Murray Jones. The Clerk is directed to issue new letters of administration and to re-administer the oath to Mr. Ware. Mr. Ware shall continue in effect his current bond in the amount of $500,000.

3. The Administrator C.T.A. shall follow the terms of the Estate Settlement Agreement attached hereto as Exhibit B, as executed by Sonnie B. Potts and Virginia S. Potts, Mary McGowan, Lucy DePriest, Kimberly Ingram, and Peggy Mathes as guardian *ad litem* when disbursing the assets of the Estate.

4. The transcript of the proceedings on November 4, 2002, to be filed with the Court under a separate notice of filing, are adopted herein by reference and shall be a part of this Order.

5. This will contest is dismissed with prejudice to the re-filing of same. Court costs for this will contest shall be taxed to the Estate as provided in the Estate Settlement Agreement. The Estate shall remain open for administration pursuant to the Estate Settlement Agreement pending thither orders of this Court.

6. Pursuant to Rule *54,02* of the Tennessee Rules of Civil Procedure, this Order is a final Order, there being no just reason for delay. Pursuant to Rule 58 of the Tennessee Rules of Civil Procedure, the Clerk is directed to mail a copy of this judgment a.s entered to all parties and/or



counsel.

**IT IS SO ORDERED.**

**Frank G. Clement**
Honorable Frank G. Clement, Jr., Judge

Submitted for Entry by:

Rebecca Blair

John A. Day, #9416
Rebecca C. Blair, #17939
BRANHAM & DAY, P.C.
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(615) 742-4880

Vincent Zuccaro, #7321
101 Continental Place, Suite 111
Brentwood, TN 37027
(615) 373-0400

Attorneys for Proponents

[5]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via facsimile and U.S. mail, proper postage paid, to Roger K. Smith, Attorney at Law, 104 Woodmont Blvd., #115, Nashville, TN *37205;* Michael H. Johnson, RUTH,

HOWARD, TATE & SOWELL, 150 Second Ave. No, Suite 201, Nashville, TN 37201; Jerry Scott, SCUFF & KEA, P.O. Box 1216, Murfreesboro, TN 37133-1216; Peggy D. Mathes, Guardian *AdLitein,* 214 SecondAve. No., Suite 105, Nashville, TN 37201.1647; and Mr. William L. Harbison, Mark T. Smith, Sherrard & Roe, 424 Church Street, Suite 2000, Nashville, TN 37219, on this 7 day of November, 2002.

Rebecca Blair

[6]

**EXHIBIT A**

*(Copy—Original in Cursive Handwriting)*

Last Will and Testament of
Erin Murray Jones

I, Erin Murray Jones, a citizen and resident of Davidson County, Tennessee, and being of sound mind and disposing memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any wills and codicils that I have made heretofore.

Article I

It is my will and I hereby direct that Sonnie Edward Potts and Virginia Spurlock Potts, pay out of any monies coming into their hands from my estate, all of my just debts, funeral and burial expenses, if any, and costs and expenses of administration, and also, any succession, inheritance or estate taxes, federal or state; and I hereby authorize and empower Sonnie Edward Potts and Virginia Spurlock Potts, at their discretion, to sell such property, whether real, personal, or mixed, as is necessary to pay the same.

Article II

I wish to make the following special bequests:

I give the sum of $25,000 to my following nieces and nephews:

Sonnie Whitmore Potts, Erin Elizabeth Potts, Sonnie Levi Potts, Carol Ann Potts, Kevin Louis Ingram, Jr., Mary Madeline Ingram, Kimberly Laura McGowan Ingram, James Tyrone Potts, Larry Rayborn Mcgowan,

Jr., Brandon Seth McGowan, Annette DePriest, Bruce Roberts.

To my nephew Sonnie Edward Potts, I give all interest I have in the property located at 4204 Dakots Avenue and 830 Russelles in Nashville, Tennessee. My property located at 4401 Illinois Avenue and 842 Summerly Drive in Nashville, Tennessee.

Article III

All the rest, remainder and residue of my property, holdings and possessions owned by me at the time of my death I give in equal shares, share and share alike as follows:

½ to my nephew Sonnie Edward Potts

½ to my niece Virginia Spurlock Potts

Article IV

I nominate and appoint my nephew, Sonnie Edward Potts and my niece Virginia Spurlock Potts to serve as co-executor and executrix of this my Last Will and Testament, and further direct that they be permitted to serve without making bond.

I further direct that inventory or accounting, including beginning, interim, or final be required of Sonnie Edward Potts and Virginia Spurlock Potts.

I have hereunto set my signature this 12 day of January 1998 to this my Last Will and Testament.

/s/ Erin Murray Jones

Testatrix

**EXHIBIT B**

# ESTATE SETTLEMENT AGREEME?T

This ESTATE SEYFLEMENT AGREEMENT (the "Agreement") is made and entered into by and among the undersigned heirs and beneficiaries of Erin Murray Jones (the "Decedent"). The parties to this Agreement are: Mary McGowan, Lucy DePricst, Sonnie Edward Potts, Virginia Spurlock Potts, Kimberly Ingram, Raymond Burnett, Evie Moore, and Peggy D. Mathes, Guardian *ad 111cm* tbr minor grandnieces and grandnephews, Sonnie Levi Potts, Carol Ann Potts, Kevin Ingram, Jr., and Mary Madeline Ingram This Agreement is intended to effect the compromise, settlement, discharge and release of any and all claims, demands, rights, and obligations, existing and/or potential, between or among the parties with respect to the Estate of the Decedent, as of the date of this Agreement.

## RECITALS

1. The Decedent died on August 18, 1.998. Several wills have been submitted for probate, and a will contest action is pending in the Seventh Circuit Court of Davidson County, Tennessee (Probate Division) styled *In re. Estate of Erin Murray Jones,* Case No. 98P- 1344 (the "Will Contest Litigation").

2 The Decedent left various wills submitted in the Will Contest Litigation; they are dated January 12, 1998 (the "1998 Will"), October 28, 1996, June 4, 1996, May 3, 1993, and March 5, 1974.

3 The parties to this Agreement have all participated. actively in the Will Contest Litigation, which is set for trial beginning November 4, 2002.

4. The Estate of Erin Murray Jones (the "Estate") is currently being administered by Thomas Ware, Administrator *Pendente Lite*. The parties have reached a settlement as to all matters among themselves regarding the Estate.

5. The parties deny the claims of the other parties to the Will Contest Litigation, but have determined that this Agreement is in their best interests in order to reduce unnecessary attorney's fees, costs and expense. No party admits any liability by executing this Agreement The parties agree that this is the settlement of a *bona fide* dispute of vigorously contested. claims and that property distributed pursuant to this Agreement is not a gift.

NOW, THEREFORE, for and in consideration of the premises, mutual promises, and covenants contained herein, and other good and valuable consideration, the receipt, sufficiency, and adequacy of such being hereby acknowledged, the parties hereto for themselves and for their heirs, successors, and assigns, agree as follows:

AGREEMENT

**Section 1. Court Approval.**

The parties agree that the 1998 Will will be

admitted to probate on November 4, 2002, and the Estate shall be distributed as provided in this Agreement. This Agreement shall govern the rights of each party with respect to his or her right to distributions from the Estate. This Agreement is subject in

[1]

all respects to the approval of the Court. Upon the Court's approval of this Agreement and the January 12, 1998 Will being admitted to probate, the Will Contest Litigation shall be dismissed with prejudice.

**Section 2 Distributions.**

The parties agree that the Estate shall be disthbuted as follows:

(a) The following twelve Grandnieces and Grandnephews listed in the 1998 Will will each receive $25,000: Sonnie Whitimore Potts, Erin Elizabeth Potts, Sonnie Levi Potts, Carol Ann Potts, Kevin Louis Ingram, Jr., Mary Madeline Ingram, Kimberly Laura McGowan Ingram, James Tyrone Potts, Larry Rayhurn McGowan, Jr., Brandon Seth McGowan, Annette DePriest, Bruce Roberts. This amount shall be paid from the entire Estate, before any distribution of the Balance of the Estate (as defined below).

(b) Kimberly Ingram will receive the house on Summerly Drive and the current contents. Kimberly Ingram will also receive the $25,000 to which she is entitled as part of Paragraph 2(a) above.

(c) Those attorney's fees and expenses of Thomas Ware and Peggy Mathes which are approved by the Court and any other expenses or necessary distributions approved or ordered by the Court will be paid out of the Estate, before any disifibution of the Balance of the Estate (as defined below). All parties, other than Ms. Mathes' clients, will pay their own attorney's fees, discretionary costs, and legal expenses and those will not be paid out of the Estate.

(d) The Court costs will be paid out of the Estate, before any distribution of the Balance of the Estate (as defined below).

(e) Raymond Burnett and Evie Moore will be paid collectively out of the Estate the sum of $30,000, as a reimbursement of attorney's fees, before any distribution of the Balance of the Estate (as defined below).

(f) Each party will retain whatever personal property of Erin Murray Jones is currently in the party's possession. All personal property currently held by the Administrator *Pendente Lite,* Tom Ware, shall he returned to the party who provided that property to Mr. Ware.

(g) The "Balance of the Estate" will be defined to include those assets identified in the detailed annual accounting submitted by Thomas Ware on November 1, 2001, except as stated otherwise herein. The Balance of the Estate will include the proceeds from the sale of the rental property on Illinois Avenue and the proceeds from the American Enterprise Life annuity. The Balance of the Estate will not include the real property on Summerly Drive and the current contents, which

will go directly to Kimberly Ingram. The Balance of the Estate will not include the money from the joint account of Erin Jones and Sonnie Potts with SunTrust Bank, which finds will go directly to Sonnie Potts. The "Balance of the Estate" will not include the proceeds of the Jefferson Pilot annuity, which finds will go directly to Lucy DePriest.

(h) Mary McGowan will receive twenty-eight percent (28%) of the Balance of the Estate.

(i) Lucy DePriest will receive twenty-four percent (24%) of the Balance of the Estate plus the Jefferson Pilot annuity.

[2]

(j) Sonnie and Virginia Potts will collectively receive forty-eight percent of the Balance of the Estate and the money from the joint account of Erin Jones and Sonnie SunTrust Bank.

**Section 3 Payment of Debts, Taxes and Expenses.**

The parties agree that the Administrator *Pendente Lite,* Thomas Ware, shall continue in that role to wind up the Estate, including the sale of the real property at Illinois Avenue, and shall make reasonable provision for the payment of any remaining debts, taxes and expenses of administration of the Estate of the Decedent. The parties shall request the Court to instruct the Administrator *Pendente Life* to make distribution pursuant to the terms hereof as promptly as possible

following the Court's approval of this Agreement, subject to reasonable reserves for matters necessmy to wind up the Estate's administration. Except as expressly provided, herein, the parties a~ee that they shall each bear all the costs associated with their own legal fees and expenses, and each party shall indemnify and hold the other parties (and the Estate) hanniess from and against any liability for such party's legal lees and expenses.

In the event that any taxing authority seeks to impose a tax liability against the Estate or the persons identified in Sections 2(h), 2(i), and or 2(j) by reason of the distribution of proceeds in accordance with this Estate Settlement Agreement, the parties listed in Sections 2(h), 2(i). imdlor 2(j) agree to bear responsibility for any such taxes imposed as well as attorneys' fees and litigation expenses arising therefrom in the percentages listed in Sections 2(h), 2(i), and 2(j).

**Section 4 Indemnification and Hold Harmless.**

Each party agrees to indenmify and hold harmless the other parties hereto against and regarding any and all fees, costs, and expenses caused or necessitated by any breach of this Agrecment by such party, including, without limitation, the payment of the attorneys' fees and costs of the non-breaching parties. The parties further agree that if any type of action is brought by an individual party to this Agreement or anyone acting on that party's behalf, in violation of the terms of this Agreement, that party shall indemnify the remaining parties for any sum of money that they may pay as a result of any such proceeding, and shall

indemnify the remaining parties for any attorneys' fees and costs they may incur in responding to or defending against any such proceeding.

**Section 5 Mutual Release.**

Except with respect to the obligations created by or arising out of this Agreement, each party, for such party and such party's respective heirs, successors, assigns, agents, employees and attorneys, hereby releases each other party, and each other party's respective heirs, successors, assigns, agents, employees and attorneys with respect to all matters relating to or arising out of the Will Contest Litigation (including all matters that could have been asserted in that litigation) and/or the Estate. The parties agree to forever refrain and forbear from commencing or instituting any claim, cause of action, suit, demand, or other proceeding against each other relating to or arising out of the Will Contest Litigation and/or the Estate. It is the express intention of the parties that they shall not in the future be subject to any claim, suit, demand or liability for claims and causes of action, asserted by anyone, relating to or arising out of the Will Contest Litigation.

[3]

**Section 6. Representations, Warranties, and Acknowledgments.**

(a) The parties represent, warrant, and acknowledge that no promise or inducement has been offered or made except as set forth herein, that the

Agreement is the entire agreement of the parties, and that the Agreement is binding on the parties' respective agents, representatives, attorneys, heirs, successors, and assigns. The parties represent, warrant, and acknowledge that the Recitals set forth above are incorporated as provisions of this Agreement. This Agreement shall be and is a fully binding and complete settlement by and among the parties.

(b) The parties represent that they have read this Agreement carefully, that they fully understand it, and that they have each received advice of counsel with respect to all releases, waivers, concessions, rights, obligations, and liabilities contained herein. Each of the parties further represents, warrants, and acknowledges that he or she executes this Agreement voluntarily with full knowledge of its content and significance. The parties understand and agree that if the law or facts with respect to which this Agreement is executed are hereafter found to be other than, or different from, the law and facts now believed by the parties to be tme, the parties expressly accept and assume the rsk of such possible difference in law or facts and agree that the Agreement shall be and remain eflèctive notwithstanding any such difference.

(c) The parties further acknowledge that each party hereto is relying on the due, proper, and. voluntary execution of this Agreement by each other party hereto in consummating the settlement and release contemplated and agreed to by the parties and that such reliance is material to each party's decision and willingness to enter into this Agreement.

(d) All representations, warranties, and acknowledgments contained in this Agreement shall survive the execution and delivery of this Agreement and the expiration and/or termination of this Agreement for any reason including a default by any party.

**Section 7 Agreement to Perform Further Necessary Actions.**

Each party to this Agreement shall, upon the request of any other party, execute, acknowledge, and deliver any additional instruments and take all other actions that may be reasonably required to carry out the intent or purposes of this Agreement, including executing an Agreed Final Judgment approving this Agreement and incorporating its terms and providing all information necessary for the disbursement of the property of the Estate as set forth herein.

**Section 8 Complete Agreement; Modification.**

This Agreement contains the complete agreement and entire understanding of the parties hereto with respect to the matters addressed herein and the terms of this Agreement are contractual and not merely recitals. This Agreement may be changed or modified only by a written instrument executed by all of the parties hereto.

**Section 9 Severability,**

If any term or provision of this Agreement shall be determined to be invalid, illegal or unenforceable, all other terms and provisions of this Agreement shall nevertheless remain effective and shall be enforced to the fullest extent permitted by applicable law. In the event that any provision of this Agreement is held to be invalid, illegal or unenforceable, such a determination shall not affect any



of the other provisions of this Agreement, and this Agreement shall be construed as if the impermissible provision had never been contained herein. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable,

**Section 10. Governing Law.**

This Agreement shall be governed by, construed under, and enforced in accordance with the laws of the State of Tennessee.

**Section 11. Parties In Interest.**

All promises, covenants, and agreements contained in this Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, successors, and assigns.

**Section 12. Subdivision Titles.**

Titles appearing at the beginning of subdivisions or sections of this Agreement are for

convenience only and do not constitute any part of such subdivisions or sections and shall be disregarded in construing the language contained in such subdivisions.

**Section 13. Counterparts.**

This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original binding as to the signing party upon execution, but all of which together shall constitute one and the same instrument. For the purpose of executing this Agreement, a faxed signature may constitute an original signature.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by themselves or their duly authorized representative as of the day and year set forth next to each of their names.

_____ _____

Date Mary McGowan

_____ _____

Date Lucy DePriest

_____ /s/ Sonnie E. Potts

Date Sonnie Edward Potts

| | |
|---|---|
| _____ | /s Virginia Spurlock Potts |
| Date | Virginia Spurlock Potts |

[5]

| | |
|---|---|
| _____ | _____ |
| Date | Kimberly Ingram |
| _____ | _____ |
| Date | Raymond Burnett |
| _____ | _____ |
| Date | Evie Moore |
| _____ | /s/ Peggy D. Mathes |
| Date | Peggy Mathes, Guardian ad litem for Sonnie Levi Potts, Carol Ann Potts, Kevin Ingram, jr., and Mary Madeline Ingram |

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Mary McGowan, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this day of 2002.

_____

Notary Public

My Commission Expires: _____

[6]

State of _____ )
)
County of _____ )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Lucy DePriest, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this day of 2002.

Notary Public

My Commission Expires: _____

STATE OF Tennessee )
)
COUNTY OF Davidson )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Sonnie Edward Potts, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and seal this 31 day of October 2002.

/s/ Rebecca Blair
Notary public

[7]

STATE OF TENNESSEE )
)

COUNTY OF DAVIDSON )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Virginia Spurlock Potts, the within named bargainor, with whom I am personally acquainted (or proved to me on tire basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this 31 day of October, 2002.

/s/ Rebecca Blair
Notary Public

My Commission Expires: 11/29/03

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Kimberly Ingram, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of

satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this_____ day of_____. 2002.

_____

Notary Public

My Commission Expires: _____

[8]

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before me, the undersigned., a Notary Public in and for the County and State aforesaid, personally appeared Peggy D. Mathes, Guardian *ad Litern,* the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this 4 day of November 2002.

/s/ Rebecca Blair
Notary Public
My Commission Expires: 11/29/03



of the other provisions of this Agreement, and this Agreement shall be construed as if the impermissible provision had never been contained herein. Any -provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force **and effect to the extent not held invalid** or unenforceable.

**Section 10. Governing Law.**

This Agreement shall be governed by, construed under, and enforced in accordance with the laws of the State of Tennessee.

**Section 11. Parties In Interest.**

All pronises, covenants, and agreements contained in this Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, successors, and assigns.

**Section 12. Subdivision Titles.**

Titles appearing at the beginning of subdivisions or sections of this Agreement are for convenience only and do not constitute any part of such subdivisions or sections and shall be disregarded in construing the language contained in such subdivisions.

**Section 13. Counterparts.**

This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original binding as to the signing party upon execution, but all of which together shall constitute one and the same instrument. For the purpose of executing this Agreement, a faxed signature may constitute an original signature.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by themselves or their duly authorized representative as of the day and year set forth next to each of their names.

October 31, 2002 — /s/ Mary McGowan
Date — Mary McGowan

_____ — _____
Date — Lucy DePriest

_____ — _____
Date — Sonnie Edward Potts

_____ — _____
Date — Virginia Spurlock Potts



10/31/02 — /s/ Kimberly Ingram
Date — Kimberly Ingram

Date _____ Raymond Burnett _____

Date _____ Evie Moore _____

Date _____ /s/ Peggy D. Mathes
Peggy Mathes, Guardian ad litem for
Sonnie Levi Potts, Carol Ann Potts,
Kevin Ingram, jr., and Mary
Madeline Ingram

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Mary McGowan, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this 31st of October, 2002.

Pamela J. Collins
Notary Public

My Commission Expires:

[6]

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before *me,* the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Virginia Spurloek Potts, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who aelmowledged that she executed the within instrument for the purposes therein contained,

Witness my hand and seal this ____ day of _____ 2002.

_____

Notary Public

My Commission Expires: _____

STATE OF TENNESSEE )
)
COUNTY OF DAVIDSON )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared

Kimberly Ingram, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this 31ST day of October 2002.

Pamela J. Collins
Notary Public

My commission expires: 9/25/04



of the other provisions of this Agreement, and this Agreement shall be construed as if the impermissible provision had never been contained herein. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

**Section 10 Governing Law.**

This Agreement shall be governed by, construed under~ and enforced in accordance with the laws of the State of Tennessee.

**Section 11 Parties In Interest.**

All promises, covenants, and agreements contained in

this Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, successors, and assigns.

**Section 12 Subdivision Titles.**

Titles appearing at the beginning of subdivisions or sections of this Agreement are for convenience only and do not constitute any part of such subdivisions or sections and shall be disregarded in construing the language contained in such subdivisions.

**Section 13. Counterparts.**

This Agreement may be executed simultaneously in counterparts, each of which shall he deemed an original binding as to the signing party upon execution, but all of which together shall constitute one and the same instrument. For the purpose of executing this Agreement, a faxed signature may constitute an original signature.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by themselves or their duly authorized representative as of the day and year set forth next to each of their names.

| | |
|---|---|
| Date | Mary McGowan |
| Nov. 4, 2002 | /s/ Lucy DePriest |
| Date | Lucy DePriest |

Date Sonnie Edward Potts

Date Virginia Spurlock Potts

[5]

STATE OF Tennessee )
)
COUNTY OF Davidson )

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Lucy DePriest, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that she executed the within instrument for the purposes therein contained.

Witness my hand and seal this 4th Day of November 2002.

S/s J- - - S- - -
Notary Public

My Commission Expires: March 18, 2004

STATE OF _____ )
)
COUNTY OF _____)

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Sonnie Edward Potts, the within named bargainor, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand and seal this_____ day of _____, 2002.

_____
Notary Public

My Commission Expires: _____

[7]

# Appendix E
# Petition for Rehearing in the Tennessee Court of Appeals

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION, AT NASHVILLE

| | |
|---|---|
| | ) No. M2002-03073- |
| | ) COA-R3-CV |
| | ) |
| IN RE: ESTATE OF | ) |
| ERIN MURRAY JONES, | ) |
| | ) |
| DECEASED | ) |
| | ) Davidson Co. Circuit |
| | ) Court, Part VII, |
| | ) No. 98P-1344 |

## APPELLANTS' PETITION FOR REHEARING

As authorized by Rule 39, T.R.App.P., Appellants Raymond Burnett and Evie Moore respectfully move the Court for rehearing on the grounds that *(i)* the Opinion incorrectly states material facts of record by omission of relevant facts of record which would alter the Opinion's stated factual basis, *(ii)* the Opinion is in conflict with or misapprehends controlling holdings or principles of law, and *(iii)* the Opinion, in effect, relies upon factual assumptions as to which the parties have

not been afforded an opportunity for an evidentiary hearing, and as to which the facts accordingly cannot be known to this Court.

Appellants insist that the matters herein raised are important and merit serious and thoughtful consideration,[1] because the sum total of their position is that the opinion does not comply with governing law, and if allowed to stand, will be a deprivation of their legal rights by Tennessee through actions of its judiciary other than by the law of the land and without due process of law, contrary to the prohibitions of Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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[1] Appellants are advised that most often, the petition to rehear is often filed in reflexive anger, as shown by an ancient Appellate Advocacy text-writer's statement that a petition for rehearing is "the best way known to man to convert perfectly good paper into waste paper." But this attitude is inconsistent with the objective of a government of laws when, as here, such a petition accurately identifies errors that arguably caused the Opinion to reach the wrong result.

In the nature of an apology Appellants clarify the fact that some comments in their brief were not intended, as the Court assumed (Opinion, p. 3, last paragraph), to be a necessary part of their argument. At all times they insisted that the Probate Court's jurisdiction to fully dispose of the estate was based upon its *in rem* jurisdiction growing from its full control of the *res*—the estate itself and all its assets—and did not require personal jurisdiction over *any* person. The comments (Appellants' Brief, pp. XI: 8-9) were about the fact that non-participating heirs at law did not join the settlement agreement. Appellants appeared and submitted themselves to the Probate Court's *in personam* jurisdiction, and as such they are not heirs at law who stood aloof and their attorney does not represent any such heirs. The statement in Appellants' Brief about heirs who have stood aloof was merely an unwise and inappropriate insertion of a legal philosophical view[2] in an argument to which

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[2] It remains counsel's legal view that no court *should be* called upon to countenance *some* settlements without the exercise of full judicial discretion to assure that the settlement conforms to governing law. The clearest example of this is when the law requires, for proper resolution of a dispute, that the best interests of a child be given prime

it did not contribute.

This does not abandon Appellants' insistence that it is beyond the jurisdiction of *any* Tennessee Court, trial or appellate, without the continuing consent of all parties at the time required, to enter a judgment admitting one will to probate and then order substantial distributions totally different from that will's provisions, or to enter a judgement that the decedent died intestate and then order a distribution different from that required by the laws of intestate succession, on the basis of authorities previously discussed (Appellants' Brief, p.10-11, 13). The legal validity of this proposition is supported by *In re Wooten's Estate,* 114 Tenn. 289, 85 S.W. 1105 (1904), holding that where only *some* of the parties to a will contest agreed to a settlement, it was the obligation of the Administrator to disregard the settlement contract and distribute as the law required. (114 Tenn. at 312, 85 S.W. at 1112).[3]

---

consideration and be determined by judicial discretion.

[3] Part of the basis of the decision was that the contract had not received the Court's sanction, so the Supreme Court did not have to answer the question of whether, even if the settlement had received the trial court's sanction, that Court

Appellants recognized and concede that Tennessee law has long held that will contest participants can settle such litigation, but their position is based upon the fact that Tennessee law denies every judge the power to convert a settlement agreement into a judgment unless all parties are still consenting to the judgment when the Court gives its approval in open court

Where all contesting parties agree to split an estate's assets between themselves, the most lawful way to do this would be as done in *Tate v. Camp,* 147 Tenn. 137, 245 S.W. 839 (1922): Settling without judicial involvement, followed by the necessary non-suiting as to all wills not to be probated and non-suiting by any participating heirs at law who do not take under the agreed will, and finally probating that will in the usual form in uncontested probate. Distribution then follows accordingly, with any further distribution to be as the parties wish, either voluntarily in accord with their agreement or as

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could properly order distribution in a manner in excess of its jurisdiction. As previously shown, that issue has since been answered favorable to Appellants' position (Appellants' Brief, p.11). .

enforced in a contract action or other action.

The mode of disposition of this case is most unseemly, and should not be encouraged by any appellate decision: Two highly-antagonistic groups of relatives fight long over a decedent's assets, each group charged with having the decedent under their dominance and subject to their undue influence, with the evidence so in conflict that no summary judgment could be granted, yet these two suspect groups agree to settle between themselves, in a manner different from **any** will and contrary to the laws of intestate succession, while other non-consenting parties are objecting to the settlement, in the trial court's words, "kicking and screaming saying no, no, no." (R., XI:15, l. 24–16, l. 6). In this endeavor, the agreeing parties are fully supported by another putative legatee which cooperation gives the appearance of connivance, because she would inherit **far more** under a 1974 will than any other alternative, yet she refuses to support it. The 1974 witnessed will is left on the courtroom table, properly offered for probate, with its beneficiaries entitled to trial by jury to determine its validity, yet it is given no recognition whatever, although its validity at the moment of execution is not denied by any party and there

is a distinct possibility that it still stands unrevoked.

The Opinion herein is contrary to law because the Probate Judge had no power to approve the will at the time he gave his approval because at that moment, Appellants, being both 1974 legatees and heirs at law, had withdrawn their consent and communicated the fact of this withdrawal to the Court. The record conclusively proves this beyond dispute. The Opinion incorrectly assumes Appellants were in the position of consenting at the moment the settlement received the Court's sanction, which assumption is without any support in the record—and it is the record that is authoritative, not unsupported statements in any party's brief.

It is questionable whether an intermediate appellate court has authority to reject or modify square holdings of the Supreme Court, unless by demonstrating that such Supreme Court holding was itself erroneous,[4] yet the Opinion herein

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[4] This occurred in the originally unreported decision of *State ex rel. Harbin v. Dunn,* 39 Tenn. App. 190; 282 S.W.2d 203 (M.S., 1943), which the Supreme Court approved and ordered published 12 years later in *Day v. Walton,* 199 Tenn. 10, 281 S.W.2d 685 (1955). .

gave authoritative effect to such an intermediate appellate holding, *REM Enterprises v. Frye,* 937 S.W.2d 920 (Tenn.App., E.S., 1996, App.den. 1997).[5] *Frye* reached its conclusion on rationale different from that required by the Supreme Court in *Harbour v. Brown,* 732 S.W.2d 598 (1987), and did so on no basis but an encyclopedic quotation in *Harbour.* This CJS quotation described two alternative rules, that a party to a settlement might revoke his consent at any time before it received the Court's *sanction,* or before the later date when it was made a judgment. In *Frye,* the Settlement Agreement was signed and made of record in January, read to the chancellor, and received his immediate sanction in open court two months *before* the husband sought to withdraw his consent in March (931 S.W.2d at 921), so that judicial sanction

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[5] Actually, this citation is inaccurate. In *Frye,* despite upholding the chancellor's sanction of the settlement, there had been no evidentiary hearing so that the record did not prove the defendant violated the court's injunction, so the case was ordered remanded for an evidentiary hearing on injunction violation. Later, this Court recalled and modified its decision upon finding that the record affirmatively proved the injunction **had not been violated,** *REM Enterprises v. Frye,* 958 S.W.2d 747 (1996; App.den., 1997).

occurred *before* the attempted withdrawal, though judgment was not entered until afterward.

Here, withdrawal of consent unquestionably occurred **before** sanction was given, so *Frye* is no authority for the holding herein. Before making record references, it should be noticed that in fact, *Harbour* did not quote from the CJS article as a statement of Tennessee law, but clearly described it only as the "general rule defining the power of a court to enter a consent judgment" (732 S.W.2d, at 599), *i.e.*, the rule applicable in most states or in many states. In two separate places, the Supreme Court clearly stated the Tennessee rule as being more strict, with citations to prior authorities. "But a valid consent judgment *can not be entered by a court when one party withdraws his consent and this fact is communicated to the court* ***prior to entry of the judgment.***" (732 S.W.2d, at 599; emphases Added). Then after quoting CJS's statement of the "general rule", the Supreme Court again stated Tennessee's law: "It is not sufficient to support the judgment that a party's consent thereto may at one time have been given; *consent must exist* ***at the very moment*** *the court undertakes to make the agreement the judgment of the court.*" (732 S.W.2d, at 599;

emphases added). Which trumps the other on Tennessee law in 1987, the Supreme Court of Tennessee or CJS?

But more: The Supreme Court has since spoken in its rule-promulgating capacity, and these combined authorities have been thoroughly analyzed in this Court's scholarly and authoritative opinion, *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., M.S., 2000), proving that the settlement-communication and judicial sanction must occur in open court in the presence of all parties, **not** in a one-party telephone conversation, **not** in chambers, and **not** when the judge is acting as Settlement Judge rather than as Trial Judge.

The Opinion herein simply fails to defer to Tennessee law as authoritatively established, and fails to defer even to this Court's assumption that *Frye* modified the authoritative force the holdings and rules of the Supreme Court of Tennessee.

***The Opinion's Erronious Assumptions:***

*Withdrawal of Consent*—The Probate Court recognized that at the time of the settlement conference on October 21,

2002 and related telecommunications the following day (referenced, Opinion, p. 2, third full paragraph), Judge Clement was acting in the capacity of settlement judge (R, V: pp. 10-12), not trial Judge. Under the authority of *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., M.S., 2000), a convenient way to refer to these happenings is as "non-judicial proceedings." As already summarized and proven with accurate record references: In these October 21 non-judicial proceedings, all conceded that Appellants' attorney plainly stated he lacked the authority to agree, and accordingly that Appellants **did not** agree. Appellants' attorney's telephonic communication to the judge the next day, that they now consented to the agreement, was followed, as the Opinion recognized, by Appellants' later withdrawal of their consent (Opinion, p. 2, fourth full paragraph). Obviously, the Probate Court did not give its open-court sanction of the agreement simply by action of the judge, while acting as Settlement Judge, in receiving telephonic information. Even in his capacity as Settlement Judge, there is no evidence that Judge Clement sought officially to sanction the settlement or did more than telephonically congratulate

some of the lawyers.

As shown in the preceding paragraph, Appellants' former attorney Roger Smith, by motion to withdraw as counsel filed November 1, 2002, informed the Court that Appellants had withdrawn their consent to the agreement, with copies thereof going to all counsel of record. The motion made other factual representations, whose contents and relevance are noted below *(infra,* p.7), along with the Court's comments also discussed below *(id).* The Court did not state its sanction of the settlement agreement until far into the November 4, 2002 hearing (R., XI: 17), long after Appellants' withdrawal of their consent had been communicated, and long after the Court, apparently for guidance as to action it might take, had asked Appellees' counsel if they believed it was empowered to both excuse Appellants' counsel *and* approve the settlement agreement (R., XI: 9), looking forward to possible *future* judicial action, long after the withdrawal of consent occurred on the record.

*Participation in Settlement Negotiations:* In the same manner that, as pointed out before (Appellant's Brief, pp.14-

15), the record develops no conflict-of-interest facts (as distinguished from surmises and assumptions),[6] just so, there has been no evidentiary hearing on the way the settlement agreement was reached. Only the sketchiest details in the record is in the limited sworn testimony of Appellant Burnett (R., XI: 18, 19, 20) about perceived pressures upon Appellants in temporarily agreeing to accept this agreement.. However, the Court itself brought up the question of a possible "Rule 11 letter" and Appellees' Attorney Day confirmed that he had sent "one to Mr. Smith" the day after the settlement hearing (R, XI: 3-4), October 22, 2004, whose purpose, as in every "Rule 11 letter," is to compel withdrawal from the litigation.[7]

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[6] The lack of evidence about these events exists simply because that movant failed to file the required supporting affidavits to prove facts outside the record.

[7] This unsworn statement of counsel is only a concession, not evidence. Appellants insist that if there were an evidentiary hearing on the excessive pressure imposed upon them, they would prove that Attorney Smith's communication to them was frantic, not deliberate, because the threat was first communicated to him by fax at 5:35 p.m. on October 21, 2002, as electronically recorded.

The only evidence in the record—Raymond Burnett's sworn testimony, is that he and his sister felt pressured to agree overnight (R.,XI: 18, 19, 20) and Attorney Roger Smith's November 1, 2002 Motion to Withdraw, which was communicated to Judge Clement as the first motion he mentioned in the November 4 hearing, reveals Mr. Smith's representation that **he did not participate in any negotiations:** He was told on October 18, 2002 that the "principal parties"—these obviously being legatees Sonny and Virginia Potts under two contested wills and nieces and legatees McGowan and DePriest under two other contested wills—"had reached" a settlement agreement and that at the October 21 settlement conference, he "was informed of the terms" the agreement dictated and the amount his clients would receive under it (R., p. 572, ¶¶ 3, 4).

Obviously, as already briefed (Appellants' Reply Brief, p.3, n. 1), a Rule 11 communication must be in the form of a motion, presumably ready to file with any required supporting affidavits,[8] and any seasoned lawyer would regard a mere "Rule

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[8] This is because the obvious purpose under Rule 11, and

11 letter" as posing no threat at all. From the Court's questioning, Attorney Day's reply, and Appellant Burnett's sworn testimony about the pressure he felt from Attorney Roger Smith's call, the pressure was felt.

In fact, the delivery of a "Rule 11 Letter" was itself an inappropriate threat because, even though Attorney Smith did not show any sign of knowing it, it appears that no Rule 11 motion could have been filed in good faith against Mr. Smith. Rule 11, T.R.Civ.P., addresses the act of filing or advocating pleadings and other such documents in court without meeting the Rule's requirements to assure that the filing is justified. The record proves that Mr. Roger Smith **never filed anything** except his November 1 motion to withdraw from the case. Mr. Roger K. Smith did not even sign and file a notice of appearance. Appellants' attorney of choice, Mr. Clemmons, was disqualified by order of June 21, 2002 (R., 710) and it was Mr. Clemmons who filed **all** of Appellants' probate petitions,

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cases applying it, is to give the offending lawyer time to withdraw for himself and/or his clients, because he cannot possibly respond without being told the form and particularities of the charges against him.

objections, and other such filings. The only thing filed after Mr. Clemmons' removal requiring signature by Appellants' counsel was a *consent order* allowing Contestant Kim Ingram (formerly Mr. Clemmons' client) to amend her past pleadings, entered 3 days after Mr. Clemmons' removal, June 24, 2002. The attorney who approved it for these appellants was Mr. Clemmons (R., 713), perhaps signing before his removal from the case. And he clearly did not represent the Appellants, but only himself, at the November 4 hearing where he appeared to withdraw. The only person to speak for Appellants was Appellant Burnett, and he did not speak until after the Court had ruled (R., XI: 17).

*Attorney Clemmons "conflict of interest":* In the matter of the assumed conflict of interest in Attorney Clemmons representing Appellants after his withdrawal from the representation of their former co-contestant Kim Ingram, Appellants demonstrated in their brief the absence of any conflict of interests partly by expounding the accurate meaning of words (Appellants' Reply Brief, p. 6), as do lexicographers in discerning words' meanings and in compiling dictionaries, as Chief Justice Marshall did in his great opinions, and as

appellate courts have constantly done before and since those days. Appellees, being unable to answer this rational demonstration, presented argument that did not attempt to answer Appellants' rationale, then insulted it by branding it as "nothing more than semantics." (Appellees' brief, p. 23). Appellants demonstrated that the real meaning of "semantics" relates to the actual, true meaning, as studied over time, as in the example of "hussy" originally being a contraction for "housewife," but now having a changed meaning. Appellees' response—assuming "semantics" has a trivial meaning—is in the nature of name-calling, or an *ad hominem* attack, recognized in all reasoning as a logical fallacy, as an attack on the messenger rather than the message, and as such, invalid argumentation.

Unfortunately, the Opinion adopted Appelles' insulting response, dismissing Appellants' proper word usage and rhetoric by branding it as merely "arguing semantics." (Opinion, p. 5.), appearing to leave the impression that the argument is false on its face. Even though such phraseology has been used in a few U. S. Supreme Court opinions, casual and imprecise usage was criticized by Justice Frankfurter as an

uncritical use of words which, because of the felicity of its sound, comes to be used uncritically and inaccurately.[9] Despite its felicity of use, it is difficult to imagine any context as to which the comment "mere semantics" would be a rational comment, although it could be used without the "mere" or "nothing more than" to distinguish from actual semantic use, or accurate meaning, as in making the difficult showing that something other than the accurate meaning of the words was intended.

The correct use of words is a part of the search for and expression of truth, and the perversion of their meaning is a very great evil, and the best and most widely-recognized description of this evil is in George Orwell's novel, *1984,* describing a dictatorial nation which everywhere posted its slogan, "War is Peace, Freedom is Slavery, Ignorance is

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[9] The "uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Railroad Co.,* 318 U.S. 54, 68, 63 S. Ct. 444, 452, 87 L. Ed. 610, 618 (1943).

Strength," and in which the agency that existed to falsify history and emit false propaganda was called the Department of Truth.[10]

There can be no demonstration of the actual existence of conflict between the real interests of Appellants and Kim Ingram until **someone,** in clear and understandable language, proves by syllogism **why** conflict is shown to exist, when both Appellants and Ingram are urging the *invalidity* of the same two wills, Appellants are arguing the *invalidity* of two other wills under which Ingram would take **nothing** (and whose invalidity could only benefit her) and Appellants are supporting the *initial validity* of the 1974 will, which Ingram is not supporting, but under which she would receive much more money than under any other possible alternative (Appellants' Brief, p.5, 8-9). That explanatory demonstration has yet to be written by anyone.

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[10] All know that this prescient description achieved life in the Communist dictatorship which enslaved the peoples of the Soviet Union, where history was not only falsely rewritten, but the pictures of disapproved persons were removed and photographs re-assembled to support the pretense that those "un-persons" never existed and could not be noticed or remembered.

When parties to litigation have been furnished copies of authoritative appellate opinions and copies of briefs, and are literate persons who can perceive that the law was not followed and that the Opinion did not accurately summarize the dispositive facts, then no lawyer can explain to clients how the decision was reached, because a lawyer can never observe the judicial conferences at which cases are decided, although the decision-making methodology of the U. S. Supreme Court is a matter of public knowledge from both literature and the opinions themselves.

Every appellate opinion should meet and affirmatively demonstrate the wrongness of serious positions competently taken by the losing party which, if correct, would require a different result. When an opinion fails to do this, it fails to accomplish its rational objective of proving the correctness of the appellate action on the case, and should be withdrawn and modified or its rational expanded to prove the correctness the opinion failed to prove.

It should not offend anyone that Appellant's counsel, in argument of this appeal, pointed out that it appeared from the

record as if none of the eminent attorneys for any of the Appellees had ever even heard of *Harbour v. Brown,* 732 S.W.2d 598 (1987) or of *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.,* 27 S.W.3d 530 (Tenn.App., M.S., 2000). The truth of the matter is that Appellant's attorney had never heard of either case, and has since mentioned it to a number of experienced and scholarly Nashville lawyers, none of whom had ever heard of either case. But, as this writer's experience shows, with such modern facilities as WestLaw and Lexis, it is **impossible** to research this subject by the modern word-search method without immediately finding these cases. The point is that the content of law is always determinable only by research, *never* by what lawyers reasonably believe the law to believe, and the law should never be modified by judicial decisions to accommodate the convenience of lawyers.

The Opinion's indication of the smallness of Appellants's (Opinion, p. 2) shares[11] is irrelevant to any proper

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[11] Actually, the indicated 2% share is understood to be incorrect. With the death, without issue, of some of the heirs

decision. Actually, no judicial or rational decision should ever be result-oriented, but if possible results have any place in the decision, the Court should know of possible results here: If the two identical 1996 wills, favoring McGowan and DePriest, were valid, they would revoke both the prior 1993 will favorable to Sonny Potts, *et ux.*, and the 1974 will, favorable to both Appellants and Kim Ingram, if these 1996 wills were then revoked, as contended below with considerable evidentiary support and the 1998 holographic will were determined invalid for undue influence by the Potts couple, the heirs at law would inherit, and each of Appellants' interests would be much larger (Appellants' Brief, pp.8-9). If both the sets of two wills, favoring the Potts couple and the sisters McGowan and DePriest should be held invalid for undue influence, this would leave the 1974 will standing valid, giving Appellants much smaller shares but giving Ingram a much larger share than any other alternative. And if the 1998 holographic will shall be held valid, the Potts couple will inherit almost the entire estate. No

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sharing 12½% bequest under the earliest will, each of the 3 surviving legatees would receive 4-1/6%, which would be over $200,000 of the $5,000,000 residue.

one can tell what would be the outcome except through trial by jury.

This is the only mode of determination provided by law, unless the case be settled in a manner authorized by law. That has not occurred here. The only disposition of this estate that is in accord with Tennessee public policy is that which, absent proper settlement, ordains distribution precisely as determined either by a will or by the law of intestate succession.

Respectfully submitted,

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# Appendix F
# Application for Permission to Appeal filed in the Supreme Court of Tennessee

IN THE

# Supreme Court of Tennessee,

## AT NASHVILLE

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| | ) |
| | ) No. _____ |
| | ) |
| | ) |
| | ) |
| | ) **Court of** |
| IN RE: ESTATE OF ERIN MURRAY JONES, | ) **Appeals No.** |
| | ) **M2002-03073-** |
| | ) **COA-R3-CV** |
| DECEASED | ) |
| | ) |
| | ) **Davidson Co.** |
| | ) **Circuit** |
| | ) **Court, Part VII** |
| | ) **No. 98P-1344** |

## APPELLANTS' APPLICATION FOR PERMISSION TO APPEAL

Raymond Burnett and Evie Moore, Appellants in the Court of Appeals (herein, "Appellants"), who were proponents of one will and contestants of four others below, respectfully make application to the Court, under Rule 11, T.R.App.P., for permission to appeal the judgment of the Court of Appeals approving a settlement agreement as to which the Appellants communicated to the Circuit Court the withdrawal of their consent thereto before the Circuit Court either sanctioned the same or entered judgment thereon.

## I—THE JUDGMENT OF THE COURT OF APPEALS

The opinion and judgment of the Court of Appeals were rendered February 25, 2004, and Appellants' timely petition for rehearing was denied March 29, 2004.

## II—QUESTIONS PRESENTED FOR REVIEW

1st: Whether the Court of Appeals erred *(i)* in affirming a so-called "consent" judgment when the record established, without dispute, that the Appellants' "consent" was given under pressure from their attorney pursuant to a "Rule 11 Letter," when this consent was only telephonically communicated by

their attorney to the judge, while acting as settlement judge off the bench, its terms were then not fully worked out, and it neither received the sanction of the Court nor was reduced to judgment until after knowledge of withdrawal of consent was communicated to the judge, with the agreement itself, when finally signed by all parties but Appellants, specifically providing that it was conditional upon court approval; and *(ii)* in rejecting Appellants' contention that it is beyond the jurisdiction of any court in will contest litigation to sustain a will and then order distribution contrary to the will's terms, absent continuing consent of all parties actively participating in the litigation.

2nd: If the Court erred in refusing to reverse the judgment, whether it also erred in failing to sustain Appellants' secondary issues, important only in the event of remand for trial, being *(i)* that there was no conflict of interest—real or apparent—barring Appellants' former and selected attorney Clemmons continuing to serve as their attorney over the objections of his former client and Appellants' former co-contestant, Kimberly Laura McGowan Ingram, who continued to contest the same will through other counsel, and where no possible injury to her

interests from Appellants' positions was enunciated; and *(ii)* for clarification of the law as applied prejudicially to Appellants in the trial court, whether the proper mode of procedure in statutory will contest cases is to proceed merely upon written notice to all possible heirs, giving them the privilege to appear and participate as previously, instead of summons, commanding appearance and enforceable by default judgments barring their later non-permissive intervention.

3rd: Whether, when a Petition for Rehearing under Rule 39(a), T.R.App.P. demonstrated that the Appellate Court's opinion was contrary to the law and did not accurately state the dispositive facts, construction of that Rule's provisions in the light of the Constitutional prohibitions against judicial destruction of interests but by the law of the land and by due process of law, Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and Section 1 of the Fourteenth Amendment to the Constitution of the United States, or those Constitutional provisions themselves, impose a duty upon the appellate court to withdraw and correct such erronious opinion.

## III—THE RELEVANT FACTS

The most relevant facts, as conceded by all parties in their appellate briefs, are that all dispositive facts are set out in the transcript of a hearing held November 4, 2002, two days before the November 6 scheduled will contest trial date, the one and only post-settlement-conference open-court hearing, with active parties present, *after* Appellants had communicated to the Court their withdrawal of consent to a settlement agreement, of which the Court late in such hearing orally stated its approval. The settlement agreement, signed by many of the parties, was then approved in (and attached to) judgment entered November 14, 2002.

The facts appeared in the final hearing mostly from statements by the Court, which all attorneys present conceded to be correct, but secondarily by statements of counsel, all concerning a settlement conference held October 21, 2002, with the trial judge, Hon. Frank G. Clement, Jr., acting as settlement judge with the consent of all parties. As established by Judge Clement's factual recital, all parties *but Appellants* agreed to the broad terms of a proposed settlement during the October 21

conference, Appellants' counsel transmitted knowledge of their reluctant agreement to Judge Clement by an individual telephone call to his office on October 22, 2002. Knowledge of Appellants' withdrawal of their consent was acknowledged by the Circuit Judge to have been communicated to him by the motion of Appellants' new (and substitute) counsel, Roger Smith,[1] to withdraw from the case on the ground that Appellants had withdrawn their settlement consent and withdrawn his authority to settle as previously granted to him on October 22, 2002.

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[1] Mr. Smith was employed by Appellants to replace their attorney of choice, John Clemmons, after the Court ruled him disqualified, but Mr. Smith never filed anything in the action but his motion to withdraw as counsel, filed before the November 4 hearing, as set out in Appellants' Petition for Rehearing in the Court of Appeals (p. 7), which the Court acknowledged at the beginning of the November 4 hearing. In addition to informing the Court that Appellants had withdrawn their consent to the settlement, but also informed the Court that he had not engaged in any negotiations, but had been told by opposing counsel on October 18, before the October 21 settlement conference, that the leading litigants had reached a settlement, being the Potts legatees under the contested 1993 and 1998 wills and the McGowan and Depriest under the 1996 wills.

The will contest case involved five wills submitted for probate, the four most recent of which were contested.[2] The Court of Appeals held that the case had been settled and the consent judgment to be valid, even without the continuing consent of two active parties, the Appellants, by quoting the trial judge's statement in the November 4, 2002, hearing at which the settlement was first approved by him, that "[there] is no question in my mind that this contest of wills was settled almost two weeks ago . . . on Tuesday, October the 22nd." (Opinion, p. 2, last paragraph), quoting from the November 4th transcript (p. 16).[3] However, Judge Clements' comment

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[2] A 1971 will was offered for probate by Appellants, not contested by anyone, so that on the record it was initially valid, but it was followed by four written wills, each with a revocation clause, so that if any of these was initially valid, it would revoke the 1971 will. The four later wills were two (1993 and 1998) favorable to Decedent's nephew Sonny Potts and others and two identical ones executed on different dates in 1996 mainly favorable to her nieces McGowan and DePriest.

[3] Further references herein to that transcript are simply to "Tr.," which was volume XI of the record and was so referenced in Appellants' Court of Appeals briefs.

referred to unanimous agreement of all active parties which had occurred *at one time,* before Appellants revoked their consent, and the judge did not assert that he had sanctioned the agreement over the telephone, in open court, or anywhere else before the November 4 hearing, nor did he state that each and every provision of the claimed "settlement" was reported to and approved by him, either orally or by formal writing, and either in his capacity as settlement judge or as trial judge. As pointed out to the Court of Appeals (Appellants' Reply Brief, p. 3), Appellants *never* signed the agreement, which was not signed by most of the other parties until various dates between the settlement negotiations date, October 21, 2002, and the open-court hearing of November 4, 2002. (Signature pages, Record, 1165, *et seq.).*

At the beginning of the hearing, following the Court's announcement of the intent to first take up Appellants' attorney Roger Smith's motion to withdraw as counsel (Tr., 3) because Appellants had revoked their consent to join the settlement, the lead counsel for the settling parties summarized the facts that **no unanimous agreement** had been reached at the October 21 settlement conferences, that Attorney Roger Smith had

telephonically communicated to him and to the Court knowledge of Appellants' October 22 willingness to go along with the settlement, and the actively-negotiating attorneys then worked out the settlement's terms over the next 10 days.[4] Judge Clement then confirmed on the record that settlement had *not been reached* at the October 21 settlement conference, Attorney Roger Smith having no authority to commit his clients, the appellants, and that he was still acting as settlement judge,[5] not trial judge, when Attorney Roger Smith communicated to him that at that moment on October 22, that his clients consented to join the agreement.

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[4] After confirming both his own and the Court's knowledge that the acceptance had been telephonically communicated out-of-court on October 22, the lead settling attorney, Mr. Day, then continued, saying "And then the parties went forth *to put together a definitive agreement* and work out over the following ten days or so their respective rights and responsibilities under the settlement." (Tr., 6; emphasis added).

[5] The Court stated, in part, of this telephone call: "Just as a settlement judge, . . . I wanted to hear from Mr. Day that it was still settled, *that other parties hadn't changed their minds.*" (Tr., 11; emphasis added).

Long after recognizing on the record that Appellants had revoked their consent to the settlement (Tr., p. 3), the earliest statement made by the Court indicating approval of the settlement occurred toward the close of the hearing, when the Court did not even know Appellant was present in the courtroom: "I view this case as settled." (Tr., 17), which did not expressly state that the Court actually approved such settlement. But even later in the hearing, after explicitly recognizing that Appellants had withdrawn their consent (Tr., 20, 23) the Court stated, "I'm trying to figure out do we have a settlement. *I believe we do* unless anyone else objects." (Tr., 25; emphasis added). Shortly afterward, the Court spoke the first words formulated in the terms of a present judicial determination to approve the proferred settlement: ". . . I've got other cases that I now agreed to hear today,[6] *I am establishing that this case is settled."* (Tr., 27; emphasis added).

The settlement agreement provided for admission in probate of the 1998 holographic will, witnesses were heard

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[6] This did not speak of the scheduled will contest trial date, which was 2 days later, November 6.

proving it, and the Court directed that the settlement agreement should be approved as a part of the judgment, upon motion of a guardian *ad litem* for minor 1998 will legatees, who represented to the Court of the written agreement that "I'm sure Mr. Day has the original." (Tr., p. 38). At no time were the full terms of the settlement agreement of the agreeing parties stated in open court, and the transcript does not show that the writing was presented to and reviewed by the judge at any time before it was presented with the judgment order approving it, which the judge signed on November 14, 2002 (R., 1150-1171).

As to disposition of the estate, the validity of the two wills favoring Nephew Potts was contested by Appellants (and earlier by others), the validity of the two wills favoring nieces McGowan and DePriest. were contested by Appellants (and earlier by others), and the quality of the affidavit evidence was of such strength that all summary judgment motions were overruled as to all contested wills. It is represented to the Court that such affidavits establish a possibility determinable only by trial that the 2 Potts-favorable wills might be rejected for undue influence, and that if the identical 1996 Mc-Gowan-DePriest–favorable wills not be rejected for undue influence,

the second one was nevertheless intentionally revoked by the Decedent as a separate act. Hence, if the Potts-favoring wills were rejected for undue influence and the same happened to the two 1996 wills favoring the nieces, the 1971 will may stand and Appellants could inherit under it, but if the second 1996 will were initially valid but revoked, it would have revoked the earlier 1993 and 1971 wills, so that the estate would go to Decedent's heirs at law, under which possibility each of the appellants would receive a much larger inheritance than their possible legacies under the 1971 will.

## IV—REASONS SUPPORTING THIS COURT'S REVIEW

The primary reason this Court should grant review was that the Court of Appeals' decision was not reached by following the law, but was reached *contrary to the law,* with no record-supported attempt by that Court to demonstrate that Appellants' revocation of their consent came too late to prevent the court from being empowered to enter a consent judgment. The state of the law was thoroughly briefed to the Court of Appeals, the leading authority being this Court's decision that any party agreeing to a consent disposition of litigation may

withdraw consent at any time by communicating the withdrawal decision to the Court **before entry of judgment,** *Harbour v. Brown,* 732 S.W.2d 598 (1987), and the leading secondary judicial authority, *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.,* 27 S.W.3d 530 (Tenn.App., M.S., 2000; App.den. 2000), hereinafter referred to as *"Mahan."* That case expounded, more thoroughly than any other Tennessee appellate decision, the current state of the law in combining *Harbour,* this Court's Rule 31 on involvement of a settlement judge in judicially-overseen settlement negotiations, and *Harbour's* approving quotation from *Corpus Juris Secundum* as to the "general rule" applicable in this country. But at two different places in *Harbour,* this Court stated it to be Tennessee law, more narrowly than the "general rule," that a judge is not empowered to enter a consent judgment unless all parties are still in agreement *at the moment* the judgment was entered,[7] as expounded thoroughly in *Mahan.*

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Although *Harbour* cited numerous cases from other states, it also cited, with approval, only one Tennessee case, *Kittrelle v. Philsar Development Co.,* 50 Tenn. App. 84, 359 S.W.2d 837 (1962), whose sole basis for upholding a consent judgment, on the theory that a court speaks only through its

Long before *Harbour,* this Court had held that if less than all active parties to a will contest agree to settle, resulting in the withdrawal of some opposition and admission of the will to probate, the Court must require distribution in accordance with the probated will and the personal representative *cannot* follow the settlement agreement as agreed by fewer than all parties, *In re Wooten's Estate,* 114 Tenn. 289, 85 S.W. 1105 (1904). Of course, upon principle, it is axiomatic that absent consent of all parties, an order for distribution contrary to law—either the terms of a will admitted to probate or the law of intestate succession in the absence of a will—is beyond the jurisdiction of **any court.** *Brown v. Brown,* 198 Tenn. 600; 281

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minutes and determination of the time of entry of judgment, was that withdrawal of consent had not been communicated to the judge before the entry of judgment. This was because a letter had been written and delivered to the judge's office, but the judge had not seen it before entry of judgment, shortly after his return from vacation (50 Tenn.App. at 89, *et seq.,*359 S.W.2d at 839, *et seq.).* However, if the right to withdraw consent were at that time terminable by approval in open court, the time of communication of withdrawal would have been irrelevant, because the judge **had** heard the terms of the settlement and approved it orally in open court before going on vacation (50 Tenn.App. at 97, 359 S.W.2d at 842-843)

S.W.2d 492 (1955); *City of Bluff City v. Morrell,* 764 S.W.2d 200 (Tenn., 1988).

With the authority of both *Harbour* and *Mahan* in fact (though not in words) being rejected by the Court of Appeals, and with the obvious inadequacy of the case relied upon by the Court of Appeals, *REM Enterprises v. Frye,* 937 S.W.2d 920 (Tenn.App., E.S., 1996, App.den. 1997),[8] no prior appellate authority supports the ruling of the Court of Appeals herein. In light of the record, it is contrary to the holdings of both *Harbour* and *Mahan.*

The appellate court filings indicate that probably none of the attorneys had conscious awareness of the *Harbour* and *Mahan* requirements, and clearly none of them brought those authority-limiting cases to the trial Court's attention. A failure to follow law which no one suspected to exist is common and

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[8] In that case, the **signed** settlement was read in open Court and received the Court's approval in open court **two months before** one of the signers sought to withdraw his agreement (931 S.W.2d at 921-922). Here, revocation of consent was communicated to the Court before either approval or entry of judgment..

is understandable.

But when the requirements of law are called to an appellate court's attention, it is that court's obligation to follow the law. To decide contrary to law is to fail to fulfill the first obligation of every judge at every level of the judicial system: To follow the law and to avoid depriving litigants of their rights other than by the law of the land and without due process of law, contrary to the prohibitions of Art. I, § 10 and Art. XI, § 1 of the Constitution of Tennessee and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The explicit provision of Rule 39(a), T.R.App.P., for calling to the attention of appellate judges errors by which the opinion misstates the dispositive facts or misstates the law, necessarily implies a mandatory constitutional duty upon every appellate judge to correct such obvious failures to follow the law, otherwise the rule itself is meaningless and the promise of government or laws is a mere *façade* without supporting substance in actual real-life practice. Yet there are no judicial decisions construing and enunciating the meaning of this rule

in regard to mandatory obligations imposed upon every judge in the light of constitutional mandates. Following the law, when a petition for rehearing demonstrates that the law has not been followed, cannot be a mere privilege or prerogative of high judicial office, to be granted or withheld in an almost regal manner, but *must be an obligation* under any system based upon Constitutional supremacy.

These Appellants communicated to the Circuit Court the fact that they felt pressured to agree to this settlement proposed by the most active litigants, and communicated their decision to withdraw that consent before the Court sanctioned the agreement which *never* had the written consent of all litigants. The appellate judgment deprives them of their probable rights as legatees or heirs at law without trial and without their consent. There is a crying and urgent need for studious exposition of the law as to whether *Harbour v. Brown,* 732 S.W.2d 598 (1987), means what it holds, that the right of a consenting party to withdraw settlement consent exists until the moment of entry of judgment as it expressly says, on whether this Court's Rule 31 on court-supervised settlements has any authoritative meaning, and on whether the Constitution

actually imposes upon intermediate appellate judges the duty to follow law when it is respectfully called to their attention that their opinion fails to conform to the law.

There can be no more important issue presented to this Court for its review.

In support of this application, Applicants attach copies of the opinion of the Court of Appeals, its order denying the petition to rehear, and the Petition for Rehearing itself, so the Court can see that these issues herein raised have been respectfully and properly been called to the attention of that Court.

Respectfully submitted,

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# Appendix G
# Transcript, Probate Court Pre-Judgment Proceedings

[*1]IN THE SEVENTH CIRCUIT COURT OF
DAVIDSON COUNTY
PROBATE DIVISION

IN RE: )
)
ESTATE OF ERIN JONES ) No. -1344

Transcript of Proceedings

Taken before the Honorable Frank Clement
November 4, 2002

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As administrator:
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Also present:
John E. Climmons

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[*3] THE COURT: This is the matter of the estate of El-in Murray Jones. its the will Contest, or actually a contest of multiple wills and we have proponents of three or four wills and contestants in varying relationships. Some groups contest the latest will. Some different variations of groups contests other wills and what have you. And there have been some recent activities of possible settlement, and then some even sore recant act lvii es of a motion of en attorney to withdraw as counsel.

Probably should take that matter up first. Mr. Roger Smith. counsel for Evie Moors and Raymond Burnett, filed a motion on Friday, November the 1st, seeking permission to withdraw. I am aware through the many proceedings that we've had over the last several years and then the events that developed over the last Couple of weeks that this issue might develop.

Mr. Day, did you indeed file a Rule 11 letter?

MR. DAY: I did not file it, but I sent one to Mr. Smith on the day of our [*4] last conference, Your Honor.

THE COURT; And that is sufficient. Actually I misspoke, because sending it to him instead of filing is the proper procedure. I misspoke. And based upon my incomplete knowledge of the evidence and the positions of the parties and role Mr. Smith was playing and that of his predecessor, Mr. John Clenimons, I was not surprised that Mr. Smith filed a motion. I didn't know that he would, but I wasn't surprised. Mr. Roger Smith, would you like for me to entertain your motion at this time?

MR. ROGER SMITH: Yes, Your Honor, I would.

THE COURT: All right. Let me ask this: Is there any party or attorney for a party who opposes the motion of Roger Smith to withdraw?

MR. DAY: We object.

THE COURT: What is the basis of that?

MR. DAY: John Day of the Nashville Bar. Rebecca Blair and I represent [*5] Virginia and Sonnie Potts. Your Honor, as the Court knows far better than I, this case has had a long and tortuous history. Despite years. decades, of hard feelings, the people who have a true interest in this case managed to compromise and settle their differences, at least, insofar as this litigation is concerned after spending hundreds of thousands of dollars in attorneys' fees and out-of-pocket expenses. We came before this Court a couple of weeks ago to announce that agreement and to say that the only people who had not yet realized their obligation to step up to the plate and accept less than their wildest dreams might suggest that they were entitled to were Ms. Moore and Mr. Burnett. We explained to the Court at that time the position we would take if those parties were

unwilling to work in good faith to resolve the dispute in this litigation. Shortly thereafter, we made a settlement proposal that day. Mr. Smith called me the next day and told me that that settlement proposal was accepted. He then, [*6] it's my understanding, called the Court and said that proposal was accepted.

THE COURT: That's correct.

MR. DAY: You then called me to confirm that I had received the word, and I confirmed to you that I had in fact. And then the parties went forth to put together a definitive agreement and work out over the course of the following ten days or so their respective rights and responsibilities under the settlement.

There was no condition whatsoever to Mr. Smith's clients. They were to get $30,000 in payment towards their attorneys' fees and that was it. For some reason, they have chosen not to follow their agreement. That agreement is enforceable. This case is over in our opinion. But in the event the Court disagrees that this case is over, in other words, if you say that there is not a settlement, which I suggest Your Honor respectively would be in error, but if you say that there is not a settlement, then we're going to try this case. And we're [*7] going to put 12 in the box and we're going to try it. And Mr. Burnett and Ms. Moore are going to need a lawyer. And they've got a lawyer. And it's too late to withdraw. I understand and I would support whole-heartedly the sanctions that will be imposed in this case against Ms. Moore and Mr. Burnett, which are going to total hundreds of thousands of dollars, because of their position. It should not be imposed against their lawyer. He's done the responsible thing. He has given them accurate advice as far as I can tell.

But to the extent that this Court would say that his withdrawal, that is Mr. Smith's withdrawal, would delay the

trial of this cause, we oppose it.

So this is our position: Number one, there's a settlement; number two, if there's not a settlement, we oppose the motion to withdraw if it will stop a trial in this case. It is our position that in the event the Court determines that there is not a settlement, then we're going to go to trial **[*8]** and we want to start Wednesday morning at nine o'clock.

So if the Court is willing to let us go forward with the trial, in the event the Court determines there is no settlement and we can start Wednesday at nine o'clock, then we do not oppose the motion to withdraw. And Ms. Moore and Mr. Burnett can either make other arrangements or show up and pick their first jury

THE COURT: Is there an option that we could go forward without the jury? Is that an option?

MR. DAY: Your Honor, we would be willing to discuss that with our clients. That would require consent of all parties. And I don't know if-- it may be that Ms. Moore and Mr. Burnett want a jury. We would give it serious consideration.

We've already prepared jury selection. I mean, we're ready to go for that. But we would give it serious consideration.

THE COURT: Does anyone else wish to be heard? Mr. Smith.

**[*9]** MR. ROGER SMITH: Just renew my motion.

THE COURT: Sure.

MR. ROGER SMITH: I succinctly renew the motion itself, contained all the arguments.

THE COURT: Let me review it again with Mr. Day's views in

mind. (Reviewing motion.)

Mr. Day, do you and the other litigants believe I have the option of accepting Mr. Smith's motion to withdraw but finding that the settlement is enforceable as well? Do I have that option?

MR. DAY: I think you do. Although, I think it would be important to get on the record what the basic statement of facts that I outlined before; that number one, Mr. Smith communicated the settlement offer that we made; number two, that his clients accepted that proposal; number three, that he communicated that to us and to you with their authority. But yes, I think you can do both, Your Honor.

**[*10]** THE COURT: Well, there's no question that all of the parties asked me to serve as the settlement judge, and I advised that I wouldn't do it unless everybody agreed. And so we went around the room two weeks ago on the day that we were to have our pretrial conference and all parties said we would rather you hear it. Even if it doesn't settle, we'll all waive the requirement that the settlement judge be someone other than the trial judge.

And so I agreed to be the settlement judge upon the unanimous agreement of all parties. Then we entered into group discussions and then smaller discussions, or I did, and at the end of that day, all parties were in agreement with the exception that Mr. Roger Smith said he could not agree or disagree without conferring with his clients and he would do that that evening or the next day. Moreover, I agreed if Mr. Smith or his clients wished that I would speak by telephone conference with Mr. Smith and/or his clients, not with his clients without **[*11]** him, but I would speak with him further or with him and his clients.

The next morning, I don't remember the time of day.

MR. DAY: 10:45.

THE COURT: All right. I received a call. I was on the bench. So I called Mr. Smith back at some time in the day and we had a pleasant discussion and he advised that his clients, both of them, had been advised of his observations from the day before of the pros and cons of the settlement versus not settling and that they had agreed to settle. Specifically, they would settle for the total sum of $30,000 and that the case was over. And he advised me, Mr. Smith advised me, that he had notified Mr. Day. Just as a settlement judge, I wanted to make certain that Mr. Day -- I knew Mr. Smith was telling me the truth, that he had spoke with Mr. Day, but I wanted to hear from Mr. Day that it was still settled, that other parties hadn't changed their minds.

And so I called Mr. Day and he **[*12]** indicated that, yes, it was done. He had even spoken with Bill Harbison in the interim and conveyed the good news, as one would say, that it was settled.

So there's no question that that was not only conveyed to the other litigants, but to the settlement judge, which I think is pretty compelling. And that combined with the settlement conference that we had had the day before and combined with the request of the other litigants that I force Evie Moore and Raymond Burnett to come to Nashville for a second settlement conference, I indicated that I did not want to do that. I hadn't ruled it out, but that I did not want to do that. I felt that the telephone conference would be the better first step.

Since they were settled, there was no need for me to make the decision on whether they should have come last Monday. which would have been the 28th of October, for that flight to

Nashville for an in-person settlement conference.

So what Mr. Day has indicated is absolutely correct, and I thought I would [*13] supplement it.

MR. DAY: Your Honor, may I ask that all counsel state whether or not they agree with the Court's recitation of facts? And on behalf of Virginia and Sonnie Potts, I say we do.

THE COURT: All right. I guess all three of you represent the same two. Mr. Harbison, do you want to --

MR. HARBISON: I do agree with the Court's recitation on behalf of Kim Ingram.

THE COURT: All right. Mr. Johnson.

MR. JOHNSON: Mike Johnson for Mary, we agree.

THE COURT: Okay. And Mr. Scott.

MR. SCOTT: For Ms. Caprice,[1] we

THE COURT: And Ms. Mathes, you represent some minors?

MS. MATHES: I represent four minor children. I think one of them has come of age, but definitely agree with the settlement also.

[*14] THE COURT: Mr. Ware, you don't represent a litigant. You are the administrator pending resolution of all these issues.

MR. WARE: That's correct.

THE COURT: Is what we recited correct?

MR. WARE: It is a correct recitation.

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[1] *[sic]* Should be Ms. DePriest.

THE COURT: Mr. Roger Smith, do you want to say yes, no, or no comment?

MR. ROGER SMITH: Your Honor, I was there. I would just say no comment.

THE COURT: All right. Very good. I think Mr. Roger Smith, and I'm saying Mr. Roger Smith, because there's a Mr. Martin Smith in the case. So I can't just say Mr. Smith.

Mr. Roger Smith is indeed in a difficult position, because he, as an attorney, has a professional duty to zealously represent the interest of his clients, and at the same time, he has a duty to be mindful of other compelling rules; Rule **[*15]** 11, one of which is that if you pursue or defend a matter which has basically no merit -- I like to say basically no merit, I think the thought of no merit at all is one of those unusual situations, but which is without merit, let's put it that way, under the facts or the law, then that is considered an abuse of process and it can impose great sanctions upon a litigant and the attorney for that litigant.

And it puts an attorney in an awfully difficult position, if, and I'm not saying what Mr. Roger Smith's position is, but if his view is that pursuing the matter would be without merit under the law or the facts.

Again, I'm not saying that Mr. Smith has said that. But also Mr. Smith has a duty to advise his clients, but he does not have the right to ignore his clients' decisions no matter how foolish they may be.

And if Mr. Smith was advised, and lam absolutely a thousand percent confident that he was that the matter was settled, then he had a duty to convey that. Now if his clients have changed their mind and wish to **[*16]** not be bound by the settlement, he has a duty to advocate that position as well

and would not be permitted to go forward with a settlement if his clients are kicking and screaming saying no, no, no. He can't do that. So I view this motion as being consistent with that. There is no question in my mind that this contest of wills was settled almost two weeks ago today. It would have been on Tuesday, October the 22nd. Our settlement conference was on Monday, October the 21st. And there's no question in my mind on Tuesday, October the 22nd, it was settled and that I would have possibly required Evie Moore and Raymond Burnett to come to Nashville on the 28th if it had not been settled. Because I think that their position in this was precarious, because no will could be admitted to probate for them to inherent If I understand it correctly. It would have to be wholly intestate. And my understanding of the facts in this case are such that my chances of winning the Illinois Super Lottery are better than [*17] also agree them doing that. Like I say, I've never bought a lottery ticket. I'm for whatever's best for the people of Tennessee on that issue. I'm all for whatever's best for everybody. That's my official position on that important issue. Sorry I even used that analogy now. I view this case is settled. Now, the question is whether I grant the motion or not. But as far as I'm concerned, the case is settled Mr. Day?

MR. DAY: Your Honor, Mr. Burnett is here.

THE COURT: Oh. I didn't know that. Very good. Mr. Burnett, we'd be glad to hear from you then. I didn't know you were here. Do you swear or affirm the testimony you give will be the truth?

MR. BURNETT: Yes, sir

THE COURT; Very good then. Your name is Raymond Burnett?

MR. BURNETT: Yes, sir.

THE COURT: Excellent. Glad to [*18] have you here. What would you like to add?

MR. BURNETT: I would like to add that we are represented in the '74 will which is presented for probate. Evie Moore and Raymond Burnett are represented in the 1974 will that has been allowed in the pretrial conference which you had earlier. We are in that will. We're not just contesting. That's a misstatement on their part. We're in the '74 will and we maintain that's a valid will.

THE COURT: I stand correct. You'd have to defeat four other wills.

MR. BURNETT: Whatever is up there. I think there's three wills. But we have reason to believe--

THE COURT: I know there's a '98, two96s, a '93.

MR. BURNETT: We have reason to believe that they're not valid wills. In our opinion, we feel like we have a right to have our day in court to prove it.

THE COURT: Well, didn't your attorney speak with you two weeks ago about [*19] the pros and cons and didn't you and Ms. Moore agree to settle for 30 --

MR. BURNETT: Yes, sir, that's correct. We had like from one night, late one night, until the next morning. We weren't given any time. It wasn't like we were given a week to think about it and get other opinions. You've got till tomorrow morning. We said okay.

THE COURT: But you could have said no.

MR. BURNETT: As Mr. Jerry Scott knows, we had an agreement with our sister when we got into the case so they

could do more discovery on these wills, and which you allowed us in, Your Honor.

THE COURT: Yes, I did.

MR. BURNETT: So therefore, we felt like we had the right to be in. And he knows that we had an agreement with our sister that we were going to share legal fees and the money equal. Well, we thought we would take that approach, and then after further checking, we decided that's not the best approach. The **[*20]** best approach is to stand by the agreement to the will --to the settlement. I'm sorry, to the settlement.

It would best in our interest just to rescind that and proceed on with new counsel, because Roger bad already indicated he was coming off. We requested to get new counsel.

THE COURT: But you knew you had the right to say no, we don't want to settle, but you chose to settle.

MR. BURNETT: We chose to say that under the pressure of the situation, duress of the situation. And then to further seek advice, we were able to decide this is not correct, to do something that's not correct.

And so I'm requesting that you allow us to get new counsel and reschedule or whatever the law requires.

THE COURT: This would be your third counsel if you do that.

MR. BURNETT: Right. Absolutely right. But you understand, the first counsel was not our doing, removing them. Someone else did that.

**[*21]** THE COURT: I removed him, but your

first counsel -. the only reason he was your first counsel is because I set aside a default judgment against you because you had failed to follow the rules of court the first time.

MR. BURNETT: What was that? That I never heard of. I understand it had to do with a conflict.

MR. COURT: Mr. Clemmons, was he one of your clients?

MR. CLEMMONS: Yes, Your Honor.

THE COURT: And was he one of those that had a default against him?

MR. CLEMMONS: Yes, Your Honor.

THE COURT: But you don't know anything about that?

MR. BURNETT: I don't know about the default.

THE COURT: Is Mr. Clemmons your former attorney?

MR. BURNETT: Yes. My understanding was that Kim Ingram was on that case, was the conflict, and that's the reason he was removed.

**[*22]** THE COURT: The reason you're permitted to stand here is because I set aside the default against you because you had sit on your rights the first time and I decided I'd rather open the door to let everybody have a seat at the table of justice so that we could all be heard. And over the objection of a lot of other folks, I let you through your first attorney participate. And then when you and your -- you had three other litigants that were on your team, and then your team wound up being two instead of four. And one or two of the people on your team decided that they didn't want

their former attorney working against them. I had a duty to remove their former attorney.

So I did that. And then you got another attorney, a very fine gentleman as well, Mr. Roger Smith. Mr. John Clemmons is a fine attorney. And he represented you, and then you agreed to settle and now you want to change that again.

MR. BURNETT: Right.

THE COURT: How many times do you think we ought to have the right to set aside **[*23]** a default judgment and then to get in a fight with our co-parties and then get another attorney and then agree to something and then choose to disagree and then want to put this off a little more longer?

MR. BURNETT: No, I don't. We have always said we would like to go to court.

THE COURT: Today, we're here.

MR. BURNETT: And they turned around and we canceled. I have no counsel. So I need counsel. I feel like I have the right to counsel.

THE COURT: You've got a very good lawyer in Roger Smith.

MR. BURNETT: Roger says he can't handle this case.

THE COURT: I think what you're saying is you don't have a lawyer that agrees with you.

MR. BURNETT: Roger said he couldn't handle. It was too much for a one-man operation.

THE COURT: Mr. Smith is a very capable lawyer and

he's been in some tough [*24] cases before.

Mr. Smith has put on the record that the reason he needs to get out is because you authorized him to convey a settlement, he conveyed the settlement, you've now told him to withdraw it. He feels conflicted by your action and feels that he shouldn't go forward, and I think he's right.

Thank you, sir.

MR. BURNETT: I'm not opposed to him withdrawing off the case. I'm not opposed to that.

THE COURT: Thank you. Anything else?

MR. BURNETT: Not unless you have a question of me.

THE COURT: Anybody have a question of him?

Thank you, sir. You may step down.

Anybody else wish to be heard? Is Ms. Evie Moore here?

MR. BURNETT: She's not.

THE COURT: Okay. And forgive me. I did not know you were here. I apologize for not asking you to come forward [*25] earlier.

MR. CLEMMONS: John Clemmons of the Nashville Bar. To clear the record, there is an outstanding motion in order to clear the record of all pending matters. I wanted to bring that to the Court's attention, regarding my motion for attorney's fees.

THE COURT: Yes. You have a motion relative to your former clients, fees owing to you. Yes, sir. Thank you very much. I do remember that.

Mr. Day, anything you want to add?

MR. DAY: Only to discuss that motion. That motion is over.

THE COURT: I don't want to get into that right now, I'm trying to figure out do we have a settlement. I believe we do unless anyone else objects.

I believe that there was a settlement through a judicially sanctioned settlement conference. We did it the right way. The Court acted in reliance upon the settlements communicated.

I'm very pleased Mr. Burnett is here. [*26] I'm disappointed Mr. Burnett doesn't remember the history of his case. And I think he'll appreciate better how much this Court has gone the extra mile to see that he and others have had an opportunity to participate in this.

But I feel strongly that a deal's a deal, especially when the Court is requested by the consent of everyone to participate in the settlement conference and to aid in everyone's request to bring a matter to closure.

If any case needs to be closed, this is one of them. And the acrimony has been just terrible. I must admit I've said on a few occasions to myself that if I could disinherit everybody in this case and give the money to the Salvation Army, I would in a heartbeat. I can't say that I've been impressed with the actions of any of the litigants.

Sweet Ms. Erin Murray Jones didn't have to give anybody, any of your relatives, a penny. Most people don't understand that. Most people think, Well, I'm entitled because [*27] I was her cousin, I was her brother, I was her sister, I was her aunt, I was her uncle. You're not entitled.

The only persons who are entitled to inherent anything from an estate is a spouse. And they only get a part of it. Nobody else is entitled to get a dime. And I just think it's tragic that she spent a life of very hard work and tremendous success for it to result in this acrimony.

But when a settlement is reached and the parties act in reliance upon that, which they have, the Court has acted in reliance upon that, I've got other cases that I now agreed to hear today, I am establishing that this case is settled.

Mr. Day, do you want to announce --are you going to put on any proof at all on the will, or are we just going forward on the settlement?

MR. DAY: Your Honor, if everybody including Mr. Burnett is willing to waive in open court the putting on of the two [*28 ] witnesses to prove the handwriting of Erin Murray Jones, we will do it. But we have two witnesses here prepared to meet the statutory requirements. I think if everybody waives it on the record and Ms. Moore chose not to show up, so I think all the parties are here and the parties can waive it. We will be pleased to put it on.

THE COURT: Don't we have an agreement that the '98 --

MR. HARBISON: I'd like to say our settlement agreement, Your Honor, agreesthat the '98 will will be permitted to probate and sets forth the prope r distribution of the estate It contains all of those terms. And it provides for the 30,000 to go to Mr. Smith's clients as agreed.

THE COURT: I think it would be prudent for me as the gatekeeper to receive the testimony or affidavits of the two witnesses. And I've got an original of all of the wills here, but I don't think we need any waivers. And I don't

want to be in a [*29 ] position of dealing with Raymond Burnett on waiving or not waiving. I don't want to be a part of that. But it's my understanding the settlement just says the '98 will is agreeable to all parties. I simply have a duty as the gatekeeper to say, Okay, you all are in agreement, but now let me see if I agree, and I need to see either the witnesses or the affidavits.

MR. DAY: We have witnesses, Your Honor. Could I say one more thing?

THE COURT: Sure.

MR. DAY: It is our position at least for Sonnie Potts and Virginia Potts that not only is this settlement agreement enforceable because it was part of a judicial settlement conference, but also because there was a contract between the parties that even absent communication to the Court or participation of the Court to the process, we had a binding agreement not subject to the statute of frauds which bound all parties to that agreement either communicated by themselves or through counsel about their [*30] willingness to accept the settlement under the terms that the Court is familiar with.

THE COURT: I'm trying to find the '98 will in all of these wills.

MR. DAY: It's the handwritten one.

THE COURT: All right.

MS. BLAIR: Your Honor, may I call Joyce Payne?

THE COURT: Please.

If you would come to the witness stand, please.

JOYCE PAYNE

was called as a witness, and after being first duly sworn, was examined and testified as follows:

THE COURT: Please state and spell your name.

THE WITNESS: Joyce, J-o-y-c-e, middle initial R, last name is Payne, P-a-y-n-e.

THE COURT: Thank you.

DIRECT EXAMINATION

**[*31] QUESTIONS BY MS. BLAIR:**

Q.

Ms. Payne, just for the record, will you give your address, please?

A.

760 Harpeth Bend Drive, Nashville, Tennessee, 37221.

Q.

Thank you. Ms. Payne, did you know Erim Murray Jones?

A.

Yes, I did.

Q.

Can you tell the Court how you knew Ms. Jones?

A.

I worked at SunTrust Bank and she was one of my customers.

Q.

How long was she one of your customers?

A.

I guess the entire length of time that I was there, and that was a little over 30 years.

Q.

How frequently did you see Ms. Jones when you worked at the bank?

A.

Well, from like 1969, 1 saw her weekly, maybe a couple of times a week. And then in later years, she didn't come in quite as often.

Q

Over those years, did you come to **[*32]** witness and learn to recognize Ms. Jones' handwriting?

A

Yes, I did.

Q

You've got a will in front of you, or what has been offered to the Court as the will of Erin Murray Jones. Is that will in Ms. Jones' handwriting?

A

Yes.

Q

Are all of the provisions of that will in Ms. Jones' handwriting?

A

It looks to be, yes.

THE COURT: Please take your time and you can look it over. I just need to know if the entire document is written in her hand.

THE WITNESS: (Reviewing document.) Yes, it is.

BY MS. BLAIR: And is that document signed by Ms. Jones?

A. Yes.

MS. BLAIR: Does the Court have any other questions?

THE COURT: Do you believe that [*33] she was competent, of sound mind, at the time of the date of the document?

THE WITNESS: I do.

THE COURT: Thank you.

MS. BLAIR: No other questions.

THE COURT: Anybody wish to question the witness?

MR. HARBISON: No, Your Honor.

THE COURT: Mr. Burnett, you have the right to question the witness if you wish.

MR. BURNETT: I have no representation.

THE COURT: You still have the right to question her even if you don't have an attorney.

Thank you very much. Next witness.

MS. BLAIR: We call Ms. Roberts

LAURA S. ROBERTS

was called as a witness, and after being first duly sworn, examined, and testified as follows:

THE COURT: Please state and spell your name.

THE WITNESS: Laura, L-a-u-r-a, [*34] middle initial S, last name is Roberts, R-o-b-e-r-t-s.

THE COURT: Thank you.

DIRECT EXAMINATION

QUESTiONS BY MS. BLAIR:

Q. Ms. Roberts, can you give your address?

A. 6541 Holt, H-o-l-t, Road, Nashville, Tennessee, 37211.

Q. Ms. Roberts, where are you employed?

A. AmSouth.

Q. How long have you been with AmSouth or its predecessor?

A. With AmSouth, three years. Prior to First American for 37 years.

Q. How did you know Ms. Erin Murray

A. She's my aunt.

Q. Can you explain that relation in a more detail? She was your mother's little sister; is that correct?

A. That is correct.

Q. So I take it, then, that you knew Ms.**[*35]** Jones all of your life?

A. That is correct.

Q During those years that you knew Ms. Jones, did you come to know her handwriting?

A Yes.

Q Can you explain to the Court how you knew her handwriting?

A. We purchased an apartment complex from her, amortized over 180 months, and I would receive the check that we would pay to her. She would always endorse it on the back. So I became very familiar with her signature.

MS. BLAIR: If the Court would hand Ms. Roberts that will, the document offered as the will to Ms. Roberts.

BY MS. BLAIR:

Q. Will you review that and tell the Court whether you believe that the provisions of that document are in Ms. Jones' handwriting?

A. Yes. I think it is.

Q. And is that document signed by Ms.Jones?

A. Yes.

Q. And do you believe that Ms. Jones was **[*36]** competent on January 12th of 1998 and of sound mind when she executed that document?

A.
Yes.

MS. BLAIR: Does the Court have any other questions?

THE COURT: No. Does anybody have any questions?

MR. HARBISON: No, Your Honor.

THE COURT: Again, Mr. Burnett, you don't have to, but you may ask questions of the witness if you wish.

MR. BURNETT: I have no questions.

THE COURT: Thank you. You may return to your seat.

MR. DAY: The parties offering the 1998 will rests and rely on the statutory presumption of competency.

THE COURT: The proponents of the will have

presented the handwritten document which is a two-page instrument on yellow lined, what we would call legal paper, and two witnesses have testified that the entire document is in the hand of Erin Murray Jones, that she was competent at time It was written, being January 12th of 1998.[*37] That shifts the burden of proof. So is there anyone here who wishes to offer any evidence in opposition to the January 12th, 1998 purported will? There being no one indicating such, then the Court — there being no evidence to the contrary against the evidence presented and with the presumption that the statute provides as well, I find that this is the last will and testament of Erin Murray Jones, that it was written entirely in her hand, that she was competent when it was executed,and therefore admit the January 12, 1998 will of Erin Murray Jones to probate as her last will and testament. This siill obviously be subject to the agreement that was announced earlier. Ms. Mathes?

MS. MATHES: Your Honor, just for procedure sake, I would move that an agreement stated to you by counsel for all interested parties be made an order of the Court, and therefore you don't need the signatures of everyone involved since it's before the Court. And I'm sure Mr. Day has [*38] the original.

THE COURT: Anyone wish to speak to the contrary? All right. That motion is granted. And it being part of the settlement conference as well should certainly be enforced.

MR. DAY: Finally, Your Honor, we would like the record to expressly reflect that Mr. Burnett was in the courtroom at the time the Court asked if anyone had any evidence in opposition to the 1998 will and that he was silent.

THE COURT: Okay. That's correct

And, Mr. Roger Smith, I commend you for honoring your duty to your client. I know sometimes these things put good lawyers in the middle, but I think you handled that professionally.

And if I didn't say so earlier, I can't remember when I did, but your motion was granted to withdraw. Forgive me if I failed to state that.

All right. The clerk will enter this **[*39]** on the record. Now that we have a will, do you wish for Mr. Ware to continue to complete the administration, or do you wish for there to be someone other?

MR. DAY: I think as part of the agreement, Your Honor, yes.

THE COURT: Mr. Ware, as part of the agreement, if you will, we'd like for you to serve as the administrator CTA with the will annexed. As you know, the clerk will need to ask you to sign a new oath and issue new letters, but you'll continue to fulfill the same services.

MR. WARE: Yes, Your Honor.

THE COURT: Thank you all very much.

MR. DAY: For completeness, Your Honor, we would like to introduce and put into the record the settlement agreement, and we will gather those papers up.

THE COURT: Please. All right. I'll give you the will and the other

purported wilts. Thank you all very much.

MR. DAY: Your Honor, while we're **[*40]** all here,

we're prepared to address Mr. Clemmons' motion both procedurally and on its merits.

THE COURT: Mr. Clemmons, if you'd like to come forward.

Mr. Clemmons, I understand you have a motion for me to set fees concerning you previous representation of MA. Moore and Mr. Burnett?

MR. CLEMMONS: Yes, Your Honor.

THE COURT: If I were to be asked to assess the fees against the estate or against a minor or a ward in a conservatorship, I would have to set that fee. But I'm of the impression, I'd like to hear from you and the others, that this is simply a contact matter between you and your former clients and it really wouldn't matter what fee I set. As you know, you have to get my permission a great majority of the time, because you might represent the conservator and the fees to be charged to the ward, or you might represent the executor and the fees **[*41]** to be charged against the estate. I do have to approve those. But you represent two competent adults, and it's my understanding those fees will not be assessed against the estate.

MR. CLEMMONS: That's my understanding also. Your Honor. It was my intention in filing this in case there was consideration of all fees to determine at the conclusion of the case. I wanted the Court to know what my fees were. It is by contract that I represent Evie Moore and Raymond Burnett and at one time did others. That's my understanding.

THE COURT: You were absolutely right. If and in the event there had been some other resolution, it might have been necessary for me to set a fee. But since this is simply between you and your clients, I'm not denying the

motion. I'm just finding that it's unnecessary for me to rule on it. It's simply a matter of contract between you and your clients and that will be a matter between you and your, clients. If you'd like to submit an order to **[*42]** that effect, you may.

MR. CLEMMONS: I will.

THE COURT: Thank you all very much.

(Court was adjourned at 9:50 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter

_____

Signature of Court Reporter Date

(2)

Supreme Court, U.S.
FILED
MAR 7 - 2005
OFFICE OF THE CLERK

No. 04-985

In The
# Supreme Court of the United States

RAYMOND BURNETT AND EVIE MOORE,

*Petitioners,*

v.

SONNIE E. POTTS, VIRGINIA S. POTTS, MARY MCGOWAN, LUCY DEPRIEST, THOMAS H. WARE, ADM'R., AND PEGGY D. MATHES, GUARDIAN *AD LITEM* FOR MINORS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Tennessee Court Of Appeals For The Middle District Of Tennessee**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

In the interest of clarity, and for the benefit of the Court, Respondent has rephrased the questions presented for review:

**Question No. 1:** Did the Tennessee trial court and Court of Appeals err in their findings of fact and interpretations of Tennessee law, thereby violating Petitioners' due process rights?

**Question No. 2:** Were Petitioners denied due process because they were denied additional and discretionary appellate review, where the issue sought to be reviewed was raised for the first time in their Petition for Rehearing to the Tennessee Court of Appeals?[1]

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[1] Petitioners' Questions Presented are:

**Question No. 1:** Under the basic language of the Due Process Clause of the Fourteenth Amendment forbidding a state's judiciary from taking property without due process of that state's law, is it a violation thereof for state courts to deny claims of Petitioners – who were both heirs at law and beneficiaries under Decedent's first will – without trial on the merits before a jury as demanded, by the sequential steps of

(a) entering a consent judgment approving a settlement (which required dismissal of all will contest claims) between two other groups of disputing relatives, each of which charged the other, and both of which were charged by Petitioners, with having Decedent under their influence and control when more recent wills favorable to the different groups were executed, where (*i*) there was well-established Tennessee law recognizing the right of any litigant to communicate to the judge his decision to withdraw from a settlement agreement and thereby deprive the judge of any power to enter a consent judgment, (*ii*) Petitioners had felt pressured to consent to the settlement but communicated to

(Continued on following page)

## QUESTIONS PRESENTED FOR REVIEW – Continued

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the judge knowledge of their withdrawal of their consent before the judge exercised the power to enter the consent judgment, (*iii*) at the settlement-approval hearing, no notice was taken of the existence of state law entitling a litigant to withdraw from a settlement agreement and the judge refused to give Petitioners time to find other counsel, but entered final judgment making the settlement agreement the judgment of the Court without intervention of the demanded jury;

(b) the state's intermediate appellate court affirmed the judgment by inaccurately pretending that the judge had approved the settlement at an earlier stage at which, from the trial judge's own statements, the requisites for vesting of settlement approval authority plainly were not met;

(c) that court refused to take any remedial action or enunciate any rationale attempting to justify its decision when it was brought to its attention by proper pleading that such was a forfeiture of property without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution, and finally

(d) the state's Supreme Court refused to review such alleged violation of federal constitutional prohibitions.

**Question No. 2:** When it is affirmatively demonstrated to an intermediate appellate court that its decision constitutes a judicial forfeiture of property in violation of the Due Process Clause of the Fourteenth Amendment, and the Court has not answered such insistence in its principal opinion, does the state judicial obligation to support the Constitution of the United States impose upon such appellate court a positive duty to correct its error?

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## PROCEDURAL HISTORY

The Circuit Court for Davidson County, Tennessee, Probate Division, entered a Final Order Dismissing Will Contest on November 14, 2002. *In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002).[1] The Tennessee Court of Appeals' opinion, affirming the Circuit Court's Order, entered on February 25, 2004. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126 (Tenn. Ct. App. Feb. 25, 2004).[2] The Tennessee Court of Appeals denied Petitioners' Petition for Rehearing on March 29, 2004. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198 (Tenn. Ct. App. March 29, 2004).[3] The Tennessee Supreme Court denied Petitioners' Application for Permission to Appeal on December 5, 2004. *In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005).[4]

## SUMMARY OF ARGUMENT

The pending Petition for Writ of Certiorari to the Tennessee Court of Appeals should be denied because it fails to raise a federal question. Though veiled in terms of "due process," the independent decisions Petitioners complain of were all based upon the Tennessee courts' findings of fact and interpretations and applications of Tennessee law. The Tennessee trial court found that all parties had consented to a settlement agreement and the

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[1] (Petition App. D, pp. App-21-App-57).

[2] (Petition App. A, pp. App-2-App-10).

[3] (Petition App. B, pp. App-12-App-13).

[4] (Petition App. C, pp. App-16-App-17).

agreement had been sanctioned by the court *before* Petitioners attempted to withdraw their consent, and thus, under Tennessee law, the court had authority to enter final judgment.[5] The Tennessee Court of Appeals reviewed these findings of fact and applications of law *de novo* and reached the same result.[6] The Court of Appeals denied rehearing, and the Tennessee Supreme Court denied discretionary review, yet Petitioners still seek a different result. They now come before this Court, requesting that this Court reevaluate the facts of the case and apply what Petitioners assert is the proper interpretation of Tennessee law.

Essentially, Petitioners request this Court to find that the state courts were wrong.[7] Petitioners disagree, not with the fairness of Tennessee law or its results as applied, but rather, with the state courts' factual findings and interpretations of Tennessee law. They have attempted to bootstrap a constitutional argument to state law issues in order to get federal review. This Court's caseload would increase one-hundred-fold if every party who lost at the trial level were allowed to argue that their constitutional rights had been violated because the court disagreed with them. Petitioners' challenges simply do not raise any federal issues and are not properly before this Court.

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[5] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[6] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-2-App-10).

[7] They request "a demonstration that the intermediate appellate opinion either misstated the facts or misstated state law." Petition, p. 15.

Further, any implicit federal issues that can be found within the Petition were not addressed by or properly presented to the state courts and have, thereby, been waived. Even if this Court were to find an implicit argument in the Petition that Tennessee law violates due process, Petitioners did not properly or timely raise such a challenge during their state appeals and have, thereby, waived any such argument.[8] In fact, Petitioners never even mentioned due process until their Petition for Rehearing to the Tennessee Court of Appeals, and at that point, it was based entirely upon Petitioners' assertion that the courts misrepresented the facts and misapplied state law.[9] Any due process argument is now waived because it was not properly presented below.[10]

Even if this Court were to find an implicit allegation that Tennessee law violated Petitioners' due process rights, and find that such an allegation is properly and timely before this Court, it would be an unfounded allegation as there simply is no due process violation. Due process is a flexible concept requiring only that a party be given notice and a meaningful opportunity to be heard, as

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[8] *See Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997) (The Supreme Court of the United States "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review.").

[9] *See* Appellants' Petition for Rehearing (Petition App. E, pp. App-60-App-61). Petitioners concede that the first time they raised the due process argument was in their Petition for Rehearing. *See* Petition, pp. 3-4.

[10] *See Adams*, 520 U.S. at 86, 117 S. Ct. at 1029.

is reasonable under the circumstances.[11] In this case, Petitioners were given notice and a meaningful opportunity to be heard. The trial court even set aside a default judgment against them to allow them to participate in the will contest, despite the fact that they had not timely entered their appearance.[12] They were participants in all stages of the litigation for over two years, including settlement negotiations. Petitioners were represented and advised by competent counsel, and they indisputably consented to the settlement agreement.[13] Petitioners' complaint is that they were not allowed to back out of the agreement after it was sanctioned by the court. This simply is not a denial of due process.

Finally, none of the factors set forth by this Court in its local Rule 10 as compelling reasons for the Court to grant review is present in this case. The opinion being challenged was not rendered by a federal court, does not involve a matter of federal law, and does not create a conflict of law.

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[11] *See Matthews v. Eldridge*, 424 U.S. 319, 333-34, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

[12] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *2-3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[13] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, pp. App-22-App-23).

## STATEMENT OF THE CASE[14]

This appeal, and the appeals preceding it, center on a Tennessee trial court's sanction of a settlement agreement and entry of final judgment in a will contest. The litigation began in 1998, when two wills of Erin Murray Jones were

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[14] Respondents do not agree with Petitioners' presentation of the facts in many instances. Pursuant to SUP. CT. R. 15(2), Respondents take particular issue with Petitioners' assertions that:

(a) The settlement was not approved or sanctioned by the court until the November 4 hearing, after Petitioners had withdrawn their consent. Petition, pp. 7-10.

(b) The probate judge was acting only as settlement judge at the time he sanctioned the parties' agreement. Petition, pp. 5, 7, 9.

(c) The terms of the settlement agreement were not finalized at the settlement conference, but rather, were worked out over the next ten days, and were not presented to the judge before he stated his approval. Petition, pp. 7-8.

(d) No party contested the validity of the 1974 will. Petition, p. 8 & n.9.

(e) None of the attorneys knew that there was a body of Tennessee law addressing when a party could and could not withdraw his consent to a settlement agreement before it became binding, and that this lack of knowledge was due to their failure to research it. Petition, pp. 3, 11.

(f) The Tennessee Court of Appeals "*knowingly* failed to follow the law" (Petition, pp. 3-4); made "inaccurate statements of the record" (Petition, p. 9); or omitted mention of facts. Petition, p. 9.

Respondents' Statement of the Case, *infra*, is consistent with and supported by the Tennessee Court of Appeals' statement of the facts. Respondents adopt and incorporate the facts as stated in Respondents' Brief to the Tennessee Court of Appeals (Attached App. 2, pp. A32-A39) and the opinion of the Tennessee Court of Appeals. *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *1-5 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-3-App-6).

offered for probate.[15] Shortly thereafter, another will was offered for probate. In 1999, as the parties proceeded with discovery, one of the parties filed a motion for entry of default judgment against certain heirs at law and legatees who had been served with notice but had failed to take any action to join the proceedings.[16] The probate court granted the motion and entered default judgment in November 1999.[17] The default judgment included Petitioners.[18]

In December of 1999, more than a year after the litigation began, Petitioners moved to set aside the default judgment against them so they could join in the litigation.[19] The court granted their motion and set aside the default judgment in July 2000.[20] Thereafter, two more wills were offered for probate, bringing the total to five competing wills, with eleven interested parties disputing their validity.[21]

It is noted that Petitioners had a proportionately small interest in the litigation, as they had absolutely no interest in the most recent four wills.[22] The only way the

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[15] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *2 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[16] *See id.* at *2-3 (Petition App. A, p. App-4).

[17] *See id.*

[18] *See id.*

[19] *See id.* at *3 (Petition App. A, p. App-4).

[20] *See id.*

[21] *See id.* at *2 (Petition App. A, pp. App-3-App-4).

[22] *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8); *see also* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, pp. A36-A37).

Petitioners stood to gain anything from the probate proceedings was in the unlikely event that four of the most recent five wills were invalidated or if all five wills, executed over a twenty-four year period, were deemed invalid.[23] Even if this were to occur, Petitioners' shares of the estate would have been marginal compared to those of the other parties to the proceeding.[24]

In 2002, within weeks of trial, all of the parties except for Petitioners attempted and were successful settling their dispute.[25] The parties requested that the court convert a pre-trial conference into a settlement conference so they could negotiate with Petitioners.[26] After several rounds of discussions, a settlement offer was made to Petitioners' attorney.[27] Petitioners' attorney requested an opportunity to confer with his clients by telephone that night or the next morning regarding the settlement.[28] The trial judge offered to participate in this telephone call, but Petitioners' attorney declined.[29] At that time, the other parties to the dispute requested that the court require the in-person attendance of Petitioners, who resided in Florida, for

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[23] *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8).

[24] For example, under the 1974 will, Petitioners each stood to take 2.08% of the estate. *Id.*

[25] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

[26] *See* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, p. A37).

[27] *See id.* (Attached App. 2, p. A38).

[28] *See id.*

[29] *See id.*

further settlement negotiations.[30] For Petitioners' convenience, the court declined to require them to personally appear.[31]

After the settlement conference recessed, Petitioners' attorney relayed the settlement offer to them by telephone, and Petitioners agreed to the settlement.[32] Pursuant to their authorization, Petitioners' attorney relayed their consent to the court.[33] Upon receiving the consent of all parties, the trial judge sanctioned the settlement and vacated the trial.[34] Ten days later, Petitioners attempted to withdraw their consent to the settlement.[35] At the hearing held to implement the settlement, Petitioners acknowledged that they had agreed to the settlement and had authorized their attorney to communicate their consent, but they asserted that they had later changed their minds and wanted to back out of the agreement.[36] The trial court found that the settlement had been agreed to by all parties and sanctioned by the court before Petitioners' attempt to withdraw and, thus, Petitioners' attempt to withdraw was untimely.[37] The trial court

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[30] *See id.*

[31] *See id.*

[32] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, pp. App-22-App-23).

[33] *See id.*

[34] *See id.*

[35] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3-4 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-4-App-5).

[36] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[37] *See id.*

proceeded in entering final judgment and dismissing the will contest.[38]

Petitioners appealed the trial court's judgment to the Tennessee Court of Appeals, arguing that the trial court erred in its application of Tennessee law.[39] More specifically, Petitioners argued that, because the settlement agreement had not been sanctioned *in open court* before their attempted withdrawal, their withdrawal was effective under Tennessee law, and the trial court lacked authority to enter judgment.[40] The Tennessee Court of Appeals disagreed with Petitioners' assessment of the facts and the law and agreed with the trial court that the settlement had been sanctioned by the court prior to the attempted withdrawal and was therefore enforceable.[41] Accordingly, the Tennessee Court of Appeals affirmed the trial court's judgment.[42]

Petitioners then filed a Petition for Rehearing, asserting various due process arguments *for the first time*.[43] The Court of Appeals denied the Petition for Rehearing without

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[38] *See id.* (Petition App. D, pp. App-24-App-26).

[39] Petitioners also asserted two other issues not relevant to this appeal; one involved the propriety of the court's disqualification of Petitioners' first attorney, and the other involved the propriety of the court's entry of default judgment against parties who had not appeared. *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *5 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-6).

[40] *See id.* at *5-6 (Petition App. A, p. App-6).

[41] *See id.* at *9-10 (Petition App. A, p. App-9).

[42] *See id.* at *10 (Petition App. A, p. App-9).

[43] *See* Appellants' Petition for Rehearing (Petition App. E, p. App-61).

comment.[44] Petitioners proceeded to petition the Tennessee Supreme Court for permission to file a discretionary appeal, reasserting their due process claims.[45] The Tennessee Supreme Court denied the petition without comment.[46] This Petition followed.

## REASONS FOR DENYING THE PETITION

### I. No Federal Issues Have Been Presented

Petitioners attempt to invoke the jurisdiction of this Court through 28 U.S.C. § 1257.[47] 28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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[44] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198, at *2 (Tenn. Ct. App. March 29, 2004) (Petition App. B, pp. App-12-App-13).

[45] *See* Appellants' Application for Permission to Appeal (Petition App. F, p. App-89).

[46] *See In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005) (Petition App. C, p. App-16).

[47] *See* Petition, pp. 1-2.

None of the issues presented for review constitutes a federal issue, and therefore, U.S.C. § 1257 does not confer jurisdiction over this matter.

Unlike review of federal court decisions, this Court's review of state court decisions is not supervisory in nature.[48] This Court has acknowledged that it is not within its province to second-guess the correctness of a state court's factual findings and interpretation and application of its own state's laws.[49]

> It is not our province to inquire whether the conclusion reached and announced by the [state court] was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.[50]

Rather, this Court's review of state court decisions is "confined to evaluating it in relation to the Federal Constitution."[51] In the case at bar, although Petitioners have veiled their questions in "due process" terms, Petitioners

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[48] *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981) ("This Court has no supervisory jurisdiction over state courts . . . ").

[49] *See Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) ("We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state, – common, statutory, and constitutional."); *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 387, 106 S. Ct. 1904, 1910, 90 L. Ed. 2d 389 (1986) ("[W]e have no authority to review state determinations of purely state law.").

[50] *Ex parte* Converse, 137 U.S. 624, 631, 11 S. Ct. 191, 193, 34 L. Ed. 796 (1891).

[51] *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981).

are actually seeking to have this Court reevaluate the facts and reapply Tennessee law.

Questions 1(a) and (b), as set forth in the Petition, address the propriety of the Tennessee trial court's entry of a consent judgment in the underlying will contest[52] and the Tennessee Court of Appeals' affirmance of that decision.[53] Petitioners assert that their due process rights were violated because the trial court and Court of Appeals misstated the facts, the law, or both.[54] The question presented is more accurately phrased: "Did the Tennessee trial court and Court of Appeals err in their findings of fact and interpretations of Tennessee law, thereby violating Petitioners' due process rights?"

Petitioners allege that they had withdrawn their consent to the settlement before it was sanctioned by the court and that, pursuant to Tennessee law, their withdrawal of consent was timely and prevented entry of the consent judgment.[55] The trial court disagreed and found that the settlement had been sanctioned by the court

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[52] In Question 1(a), Petitioners complain that the trial court violated their rights to due process by entering a consent judgment because (i) there was well-established Tennessee law allowing a party to withdraw his consent to settlement, (ii) Petitioners communicated their withdrawal before the judge exercised his power to enter the consent judgment, and (iii) no notice was taken of the Tennessee law that allowed a party to withdraw from a settlement agreement. Petition, pp. i-ii.

[53] In Question 1(b), Petitioners complain that the Court of Appeals violated their due process rights by affirming the trial court's decision, "inaccurately pretending that the judge had approved the settlement at an earlier stage . . . " *Id.* at ii.

[54] *Id.* at 15.

[55] *See id.* at pp. 7-10.

*before* Petitioners attempted to withdraw their consent, and thus, pursuant to Tennessee law, the settlement was binding and entry of final judgment was proper.[56] After reviewing the case *de novo*, the Court of Appeals agreed with the trial court and affirmed the judgment.[57]

Petitioners request this Court to reevaluate the facts and reapply Tennessee law in order to hold, ultimately, that Petitioners' version of the facts and interpretation of Tennessee law is right and the Tennessee courts were wrong.[58] It is not within the province of this Court, however, to reevaluate factual findings and to independently interpret state law.[59] Thus, this issue is not properly before this Court.

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[56] *See In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[57] *See In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *5-6, 10 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-6, App-9).

[58] Petitioners request "a demonstration that the intermediate appellate opinion either misstated the facts or misstated state law." Petition, p. 15.

[59] *See, e.g., Ex parte* Converse, 137 U.S. 624, 631, 11 S. Ct. 191, 193, 34 L. Ed. 796 (1891) ("It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws."); *Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) ("We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state, – common, statutory, and constitutional."); *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 807, 66 L. Ed. 2d 740 (1981) ("This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution."); *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S.

(Continued on following page)

Questions 1(c), 1(d), and 2, as set forth in the Petition, address the propriety of the Tennessee Court of Appeals' and Tennessee Supreme Court's refusals to grant Petitioners further appellate review. The issues presented by these three questions are more accurately phrased: "Were Petitioners denied due process because they were denied additional and discretionary appellate review, where the issue sought to be reviewed was raised for the first time in their Petition for Rehearing to the Tennessee Court of Appeals?"

Petitioners allege that, by proper pleading, they brought an alleged due process violation to the attention of the Tennessee Court of Appeals and Tennessee Supreme Court and that the courts denied them due process by refusing to address the issue. However, Petitioners failed to raise their due process claim at the trial level or in their original appellate brief,[60] and pursuant to Tennessee appellate procedure, they had thereby waived the claim.[61] Though neither court issued an opinion explaining its decision to deny additional review, this Court's precedent provides that

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380, 387, 106 S. Ct. 1904, 1910, 90 L. Ed. 2d 389 (1986) ("[W]e have no authority to review state determinations of purely state law.").

[60] Petitioners concede this point at Petition, pp. 3-4.

[61] Tennessee appellate procedure provides that issues not raised at the trial level are generally waived, and issues not raised until an appellate petition for rehearing are definitely waived. *See Harrison v. Schrader*, 569 S.W.2d 822, 828 (Tenn. 1978) ("In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal; nor will we consider on rehearing that which was not at issue in the original hearing.") (citing other Tennessee Supreme Court cases and Tenn. R. App. Proc. 32) (internal citations omitted).

the courts' silence should be interpreted as an expression that the issue was waived.[62]

Regardless of whether or not the courts explained their reasoning for denying additional review, the decision to grant or deny appellate review is left to the states and should not be disturbed by the United States Supreme Court.[63] Thus, this issue is also one of state law and is not properly before this Court.

## II. Any Federal Questions Implicit in the Petition Were Waived Because They Were Not Addressed by or Properly Presented to the State Courts

Setting aside the findings of fact and interpretations of state law, which are outside this Court's jurisdiction, the only federal question that Petitioners could have raised is

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[62] *See Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997) ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question . . . '") (internal citations omitted).

[63] *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 591-92, 67 L. Ed. 961 (1923) ("[T]he question of the right to transfer was a question of Missouri law, upon which we are bound to accept the decision of the Missouri courts."); *see also Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74, 80, 50 S. Ct. 228, 231, 74 L. Ed. 710 (1930) ("[T]he state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."); *Wolfe v. North Carolina*, 364 U.S. 177, 195, 80 S. Ct. 1482, 1492, 4 L. Ed. 2d 1650 (1960) ("Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.").

whether Tennessee law itself violates due process by allowing entry of judgment after a settlement agreement is sanctioned by the court or by denying rehearing or discretionary review because of the procedural bar of waiver.[64] However, Petitioners have not raised these arguments. Further, even if such arguments could be found to be implicit in the Petition for Writ, they were not addressed by or properly presented to the state courts and are, thus, not properly before this Court.

The Supreme Court of the United States "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review."[65] To show that an issue was "properly presented," a petitioner must show that he complied with the applicable rules of the state's appellate procedure.[66]

In the case at bar, the Petitioners did not present a due process argument or any other federal question to the trial court or to the Court of Appeals in their original brief. As discussed above, Petitioners raised their due process

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[64] *See Howard v. Kentucky*, 200 U.S. 164, 173, 26 S. Ct. 189, 191, 50 L. Ed. 421 (1906) (after declining to assess the state court's interpretation of its own law, the only question left for the U.S. Supreme Court is whether "state law, as applied, afford[ed] plaintiff in error due process"); *see also Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875) ("Our power over [state] law is only to determine whether it is in conflict with the supreme law of the land, – that is to say, with the Constitution and laws of the United States.").

[65] *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997). The Court has stated that this rule applies "with very rare exceptions," none of which applies here. *Id.*

[66] *Id.*, 520 U.S. at 87-88, 117 S. Ct. at 1030.

claims *for the first time* in their Petition for Rehearing.[67] Pursuant to Tennessee law, Petitioners' claims were untimely and were barred.[68] The Tennessee Court of Appeals denied rehearing without discussion.[69] The Tennessee Supreme Court denied discretionary review.[70]

Petitioners argue, of course, that there is "no need to invoke constitutional prohibitions ... until the state's judiciary has knowingly acted in violation of Tennessee law in determining litigation – until that point is reached, it is adequate simply to expound applicable Tennessee law with the expectation that the court will follow the law."[71] However, to the extent that Petitioners were deprived of property, the deprivation occurred at the trial court level upon entry of the consent judgment. The facts and events upon which Petitioners now base their due process argument are the same facts and events that supported their

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[67] Petitioners concede this point at Petition, pp. 3-4.

[68] Tennessee appellate procedure provides that issues not raised at the trial level are generally waived, and issues not raised until an appellate petition for rehearing are definitely waived. *See Harrison v. Schrader*, 569 S.W.2d 822, 828 (Tenn. 1978) ("In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal; nor will we consider on rehearing that which was not at issue in the original hearing.") (citing other Tennessee Supreme Court cases and Tenn. R. App. Proc. 32) (internal citations omitted).

[69] *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 198 (Tenn. Ct. App. March 29, 2004) (Petition App. B, pp. App-12-App-13). The court's silence may be presumed to be an expression that the claim was not properly presented. *See Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

[70] *In re Estate of Jones*, No. M2002-03073-SC-R11-CV (Tenn. Dec. 5, 2005) (Petition App. C, pp. App-16-App-17). Again, the court's silence may be presumed to be an expression that the claim was not properly presented. *See Adams*, 520 U.S. at 86-87, 117 S. Ct. at 1029.

[71] Petition, p. 3.

objections at the trial court level and in their original brief to the Tennessee Court of Appeals. The only thing that has changed is Petitioners' characterization of the error. Where "[t]he same ground of objection ha[s] been raised throughout the proceedings, but solely as a matter of state law," and is only turned into a federal issue upon petition for rehearing, this Court has found that the claim "must be dismissed for failure to make seasonably the federal claim."[72]

The end result is that any true federal questions that could be implicitly read into the pending Petition for Writ of Certiorari were not addressed or properly presented to the Tennessee appellate courts and are, thus, not properly before this Court.

## III. Petitioners' Due Process Rights Have Not Been Violated

Even if this Court were to find that the Petition raises a federal question and that it is properly before this Court, the Petition should be denied because any claim that Petitioners' due process rights were violated is simply without merit. The essence of the right to procedural due process is that, before being deprived of a constitutionally-protected property right, a party must be provided with "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[73] Due process does not guarantee,

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[72] *American Surety Co. v. Baldwin*, 287 U.S. 156, 163-64, 53 S. Ct. 98, 100-101, 77 L. Ed. 231 (1932).

[73] *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 62 (1965)).

in each instance, the right to a jury,[74] the right to a trial on the merits,[75] or the right to an appeal.[76] Rather, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[77] Further, procedural due process rights can be waived.[78] In the case at bar, Petitioners were provided with notice and a meaningful opportunity to participate and be heard, as was reasonable under the circumstances. Any further procedures they were due were waived by their voluntary consent to the settlement agreement.

To determine if certain judicial procedures comply with the mandates of due process, this Court has traditionally balanced three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

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[74] *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92-93, 23 L. Ed. 678 (1875); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232, 43 S. Ct. 589, 591, 67 L. Ed. 961 (1923).

[75] *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971).

[76] *See, e.g., Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74, 80, 50 S. Ct. 228, 230, 74 L. Ed. 710 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.").

[77] *Id.* (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972)).

[78] *See, e.g., Boddie*, 401 U.S. at 378-79, 91 S. Ct. at 786; *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S. Ct. 775, 782, 31 L. Ed. 2d 124 (1972) ("The due process rights to notice and hearing prior to civil judgment are subject to waiver.").

> the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[79]

In the present case, the private interest affected was not even a vested property interest. The only way the Petitioners stood to gain anything from the probate proceedings was in the unlikely event that four of the most recent five wills were invalidated or if all five wills, executed over a twenty-four year period, were deemed invalid.[80] Even if this were to occur, Petitioners' shares of the estate would have been marginal compared to those of the other parties to the proceeding.[81]

Further, the procedures employed by the probate court did not pose a high risk of an erroneous deprivation of property. Quite the contrary, the probate court went to great lengths to provide Petitioners with a fair opportunity to be heard. The court set aside a default judgment that had entered against Petitioners due to their failure to timely appear in the case.[82] This allowed Petitioners to participate fully in all aspects of the will contest. For their

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[79] *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

[80] Petitioners conceded this point in their original brief to the Tennessee Court of Appeals, in which they provide a breakdown of which parties would recover and the amounts they would recover under each of the disputed wills. *See* Tennessee Court of Appeals Brief of Appellants Raymond Burnett and Evie Moore (Attached App. 1, pp. A6-A8); *see also* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, pp. A36-A37).

[81] For example, under the 1974 will, Petitioners each stood to take 2.08% of the estate. *Id.*

[82] *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, p. App-4).

convenience, Petitioners were allowed to participate by telephone in the settlement negotiations.[83] The settlement negotiations were put on hold so that Petitioners' counsel could communicate the proposed settlement to Petitioners and confer with them overnight.[84] Only after Petitioners consented to the settlement, the settlement was sanctioned by the court, and all parties relied upon the settlement, did Petitioners attempt to withdraw their consent.[85] At this point, the probate court found that the settlement agreement was enforceable and entered final judgment.[86]

It is difficult to imagine what additional procedures the probate court was required to afford Petitioners. Short of allowing Petitioners to rescind their consent ten days after the court sanctioned the settlement agreement, the trial court afforded Petitioners with every opportunity to participate in the litigation. Any other judicial procedures available to Petitioners were waived by their knowing and voluntary consent to the settlement agreement.

Allowing Petitioners to withdraw their consent after the settlement was agreed to by all parties and sanctioned by the court would undermine Tennessee's compelling interest in promoting alternative dispute resolution ("ADR"). ADR has become an increasingly necessary and important component of the judicial system. States have

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[83] *See* Tennessee Court of Appeals Brief of Appellees Sonnie E. Potts et al. (Attached App. 2, p. A38).

[84] *See id.*

[85] *In re Estate of Jones*, No. 98P-1344 (Tenn. Cir. Ct., Prob. Div., Nov. 14, 2002) (Petition App. D, p. App-23).

[86] *Id.* (Petition App. D, pp. App-23-App-26); *In re Estate of Jones*, No. M2002-03073-COA-R3-CV, 2004 Tenn. App. LEXIS 126, at *3-4 (Tenn. Ct. App. Feb. 25, 2004) (Petition App. A, pp. App-4-App-5).

an interest in relieving the overwhelmed dockets of the trial courts by promoting amicable settlements between the parties. Allowing a party to withdraw his consent after a settlement is reached and sanctioned by the court would dramatically impair the alternative dispute process. The greatest incentive parties have to make concessions in their demands is the possibility for a swift and final end to the litigation. If parties were allowed to withdraw their consent after a settlement is reached and sanctioned by the court, this incentive would be destroyed and the effectiveness of ADR would be significantly undermined. The state's interest in promoting judicial economy by promoting ADR is compelling in this case.

## IV. None of the Rule 10 Factors Compelling this Court to Grant Review Is Present

As a final note, Respondents submit that none of the factors set forth in Supreme Court Rule 10 as reasons compelling this Court to grant review is present in this case.[87] The underlying opinion was not rendered by a

[87] SUP. CT. R. 10 provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; (b) a state court of last resort has decided an important federal question

(Continued on following page)

United States Court of Appeals, so none of the Rule 10(a) factors apply. Although one of the opinions being complained of was rendered by Tennessee's highest court, it did not involve a federal question, nor did it conflict with another state supreme court or United States Court of Appeals. Thus, Rule 10(b) does not apply. Finally, because the decision being complained of does not involve an issue of federal law and is not in conflict with the precedent of this Court, Rule 10(c) does not apply. Even if the issues presented were properly before this Court, they are simply not issues of sufficient import to warrant this Court's review.

## CONCLUSION

The Petition should be denied because it raises only state questions of law directly, and any implicit federal questions were not properly presented to the state courts and were thereby waived. Further, Petitioners were allowed a meaningful opportunity to participate and be heard. Any additional procedures that may have been due were waived when Petitioners voluntarily consented to the settlement agreement. Finally, none of the factors set forth by this Court as compelling reasons for granting review is present in this case.

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in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

For all of the foregoing reasons, Respondents, Sonnie and Virginia Potts, respectfully request that the Petition for Writ of Certiorari to the Tennessee Court of Appeals be denied.

Respectfully submitted,

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# APPENDIX 1

**Tennessee Court of Appeals**
**Brief of Appellants**
**Raymond Burnett & Evie Moore**

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION, AT NASHVILLE

| | | |
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| IN RE: ESTATE OF ERIN MURRAY JONES, DECEASED | ) | No. M2002-03073-COA-R3-CV |
| APPEAL OF RAYMOND BURNETT AND EVIE MOORE, *Contestants-Appellants* | ) | Davidson Co. Circuit Court, Part VII, No. 98P-1344 |

## BRIEF FOR CONTESTANTS-APPELLANTS

### I.

### Issues Presented for Review

1. Whether the trial Court erred in approving a settlement agreement disposing of all issues after the Appellants (Co-contestants of contested wills and proponent of Decedent's earliest will) had withdrawn their agreement to the settlement, and whether the terms of the order approving the settlement were within the Court's jurisdiction to enter.

2. Whether the trial Court erred in proceeding, as the terminal part of the settlement-approval hearing, with the first step of the will contest litigation, admitting evidence and then admitting to probate Decedent's final (1998) purported will when – (a) at the same hearing, the Court permitted Contestants-Appellants' new counsel to withdraw, and failed to continue the hearing to give Appellants time to locate and employ new counsel, and (b) in so ruling without intervention of a jury, when jury demands had been made in the will-contest petitions.

3. Whether the trial Court erred in removing Appellants' original counsel from participating in the case on the ground of conflict of interest, where their co-contestant, Kimberly Laura McGowan Ingram, filed a new will contest petition through new counsel, contesting the Decedent's 1998 will, but not contesting earlier wills which Appellants continued to contest, such not presenting a conflict of interest.

4. Whether the trial Court erred in applying to statutory will-contest proceedings the Tennessee Rules of Civil Procedure regarding default judgments for non-appearance.

## II.

## Statement of the Case

***Nature of the Case:***

The case is a will-contest case which arose from a series of will-contest complaints by different heirs and/or legatees, asserting the invalidity of each of a series of purported wills (hereinafter, "wills")[1] offered for probate in the Probate Division of the Davidson County Circuit Court.

***Course of Proceedings:***

The case began with a, probate petition filed in the Davidson County Circuit Court, Probate Division, after the death of the Decedent, who had no heirs at law other

[1] Each of these, for reading ease, is hereinafter referred to simply as a "will," without any attempted indication of validity or invalidity.

than living nieces, nephews, and the children of those deceased, with the first petition being followed by petitions to probate other wills and by objections and/or formal Will Contest Complaints. Copies of the wills were filed with the probate petitions, these being, in inverse order from the most recent to the earliest, a holographic will executed in 1998 (R., 17-18) and previous typewritten, witnessed wills: two wills, identical in terms, executed June 4, 1996 (R., 4-7) and October 28, 1996 (R., 8-11) one executed May 3, 1993 (R., 429-431), and a much-earlier one executed in 1974 (R., 656-659).

Because this appeal concentrates upon a settlement hearing and actions Appellants consider prejudicial to them at the pre-settlement stage, it is unnecessary to summarize all of the procedural steps, which were long and complex. It is sufficient to mention some high points without reference to the numerous motions and interlocutory orders, which included rulings upon summary judgment motions. These procedural steps included (*i*) the actions of the Probate Judge in appointing an administrator *ad litem,* and later recusing himself because his former law partner drew the 1993 will, causing reassignment to another Circuit judge who (*ii*) entered default judgments against all heirs, legatees and devisees who had not appeared (R., 255-256), ordered the Administrator *ad litem* removed from his position (R., 262-263), later set aside that order,. noted that settlement efforts had been unsuccessful, and recused herself from the ease (R., 301-302), (*iii*) leading to reassignment of the case back to the Probate Judge (R., 305), who later (*iv*) set aside the. default judgments (R., 313) (which permitted intervention by Appellants), then in June, 2002, entered an order disqualifying Appellants' attorney who had represented them from

the beginning (R., 710), and finally, conducted settlement conferences which culminated in the final hearing,[2] then entered the appealed order of November 14, 2002. This order approved a settlement agreement joined by all parties but Appellants. It admitted the 1998 will to probate and directed distribution of the estate's assets in accordance with the provisions of the settlement agreement (R., 1150).

Procedural steps by Appellants (who are among Decedent's numerous nieces and nephews) included their answers to an amended petition to probate the 1993 will (R., 316-321) and to the petition to probate the 1996 wills (R., 322-324), as well as their own will contest complaint (R., 325-330), in which they were joined by two other contestants represented by the same attorney, being a nephew who later non-suited (R., 705, 711), and a grandniece, Kimberly McGowan Ingram, daughter of a principal legatee under the two 1996 wills, Mary Flora McGowan. Much later, Contestant Ingram employed other counsel, filed a motion to disqualify Appellants' (and her own prior) attorney, and later filed her own will contest complaint against the 1998 will (in which she was a named legatee) (R., 707), her amended answer withdrawing her objections to the 1996 wills (R., 703), and other pleadings. On October 18, 2002, Ingram's new attorneys took the lead in addressing a letter to the Probate Court Judge concerning settlement possibilities (R., 1206-1207), which led to settlement proceedings and to the final settlement-approval order.

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[2] It was during this hearing that the Court permitted Appellants' new substitute counsel to withdraw from representing them and refused to give them time to find and employ new counsel (summarized *infra*, pp. 6-7).

Many other pleadings and much other court activity not relevant to this appeal occurred in preparation for trial.

***Disposition in the Court Below:***

Disposition. was by the Court's orders entered November 5, 2002 (R., 1147), effectuating a ruling made during the final hearing which allowed withdrawal of Appellants' second attorney (R., Vol. XI, Transcript of November 4, 2002 hearing), and the final November 14, 2002 order (R., 1150-1171, including attached settlement agreement), approving the settlement agreement and, in accordance therewith, dismissing all will contests, admitting the 1998 holographic will to probate, and directing distribution of the estate in accordance with the settlement agreement's terms.

## III.

## Statement of the Facts

The principal facts concerning the main issue herein appear in the Transcript of the Proceedings of November 4, 2002 (R., Vol. VI, pp. 1-42), the most important parts of which are summarized below.

***Legal Estate-Disposition Alternatives:***

For better understanding of the inter-relationships, Appellants first summarize parts of the various wills with identification of the principal beneficiaries who are parties hereto:

**The 1998 Holographic Will** (R., 17-18) had as its principal beneficiaries Decedent's nephew, Sonny E. Potts, to receive 4 listed real properties including

the home on Summerly Drive in Nashville and one-half of the residuary estate, with the other one-half of the residuary estate going to his wife, Virginia S. Potts. Twelve grand-nieces and -nephews, including Kimberly McG. Ingram, were to receive $25,000.00 each (or possibly jointly, subject to construction), and there were no other bequests.

**The 1996 Wills** (R., 4-11) each devised two rental-properties to Sonnie E. Potts, and left the residuary estate to each of two nieces, one-half to Mary Flora McGowan (mother of Kimberly McG. Ingram.) and one-half to Lucy DePriest, with no bequest to Kimberly McG. Ingram or any other relatives, the only other bequests, totaling $75,000.00, to three charities and $25,000.00 to Floyd Mason, a personal friend.

**The 1993 Will** (R., 429-431) had as its principal beneficiary Sonny E. Potts to receive the entire residuary estate, with the residuary to go instead to his wife, Virginia S. Potts, if Potts should pre-decease the Decedent. The bequests were a certificate of deposit to Grand-Nephew Archie F. Potts, cash bequests totaling $30,000.00 to two of the charities named in the 1996 wills, and $10,000.00 to Decedent's friend Floyd Mason, to go to Sonny Potts should Mason pre-decease her.

**The 1974 Will** (R., 656-659) left shares, the largest individual share, 25%, each to her grand-niece, Erin Elizabeth Potts (otherwise favored in only the 1998 holographic will) and her grand-nephew, Archie F. Potts (to receive the certificate of deposit under the 1993 will), smaller shares of 12½% each to the niece, Mary Flora McGowan and her daughter, Kimberly McG. Ingram, 6¼% each to nephew Sonny E. Potts (the heir mainly favored in the 1993 and 1998 wills) and grand-nephew Sonny W. Potts, with the remaining 12½% divided between Lucy DePriest (favored in

the 1996 wills), Appellants Moore[3] and Raymond Burnett, and three other relatives not mentioned in any other will.

**The Heirs at Law**, in default of any valid will, are listed in each of the separate probate petitions (*e.g.*, R., 1), and are restricted to the surviving nieces and nephews and the children of each deceased niece or nephew. These would include Lucy DePriest, Mary Flora McGowan, Evie Moore, Sonnie E. Potts, and Raymond Burnett.

The approved settlement (R., 1150-1171), signed by counsel for all parties except the Appellants, provided, for $25,000.00 to each of the 12 grand-nieces and -nephews named for such a bequest in the 1998 holographic will, including Kimberly McG. Ingram, gave Kimberly McG. Ingram the decedent's Summerly Drive home, provided that a certificate of deposit bearing the names of the decedent and Sonnie E. Potts should go jointly to Sonnie E. Potts and his wife, Virginia S. Potts, and disposed of the larger residuary estate in shares, 48% jointly to Sonnie E. Potts and his wife and the other 52% to the two sisters favored in the 1996 wills, 28% to Mary Flora McGowan and 24% to Lucy DePriest.

***The Settlement-Approval Hearing:***

As summarized by the Court during the final hearing held Monday, November 4, 2002, that hearing was preceded by a Settlement Conference on October 21, 2002 (R.,

[3] Then Evie Burnett Overstreet.

XI:16),[4] in which all parties agreed to waive any objection and consent to the Trial Judge acting as Settlement Judge (R., XI:10, ll. 9-11), followed by a group discussion with the Settlement Judge and all parties' attorneys, then by separate discussions between groups, then agreement thereto before the Settlement Judge to by all parties *except* Appellants' replacement attorney, Roger Smith,[5] who said he would have to confer with his clients before he could agree (R., XI:11, ll. 14-21). Roger Smith telephoned the Settlement Judge at 10:45 a.m. the next day, and when they talked later that day, Mr. Smith told the Judge that his clients had agreed to the settlement proposal, which would pay them $30,000.00 jointly toward payment of their attorney-fee costs (R., XI:11.). By telephone, the Settlement Judge confirmed with Attorney Day (representing Sonny E. and Virginia Potts) that Smith had conveyed this message to him (R., XI:11-12).[6] In the Court's summary, the Court then commented that as Settlement Judge, he found this "pretty compelling" in combination with the Settlement Conference "request of other litigants that I force [Appellants] Evie Moore and Raymond Burnett [who reside in Florida] to come to Nashville for a second settlement conference . . ." (R., XI:12, ll. 10-13).

At conclusion of the Court's summary, the attorneys for all agreeing parties confirmed that the Court's summary was

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[4] Such references are to Volume XI of the Record, the transcript of proceedings on November 4, 2002, followed by references to the pagination thereof, and sometimes to lines.

[5] So referred to hereinafter because, as the Court noted, the case had two attorneys named Smith.

[6] Mr. Day confirmed this in open court, and volunteered that he had telephoned and conveyed the "good news" to Ingram's attorney, Mr. Bill Harbison (R., XI:12, ll. 1-4).

accurate, and Roger Smith, following the Court's suggestion, made the response that he was there at the conference, otherwise, "No comment," (R., XI:14, ll. 12-13), In regard to Attorney Roger Smith's obligations, the Court said, in part:

> " . . . Now if his clients have changed their mind and wish to not be bound by the settlement, he has a duty to advocate that position as well and would not be permitted to go forward with a settlement if his clients are kicking and screaming saying no, no, no. He can't do that."
>
> (R., XI:15, l. 24-16, l. 6).

In regard to Roger Smith's further participation, Appellant Burnett later testified that Mr. Smith said he couldn't handle the case, because it was too much for one attorney (R., XI:23), and that he had no objection to Mr. Smith being permitted to withdraw (R., XI:24, l. 10), but confirmed that both he and Evie Moore are legatees under the early (1973) will, they believe all four contested wills – 1993, both 1996 and 1998) are void and "feel like we have a right to our day in court to prove it." (R., XI:18). He asked that the case be continued for trial at a later date to give Appellants time to locate and retain other counsel (R., XI:20, ll. 20-25). During said Appellant's testimony, the Court commented that Appellants wouldn't have been able to even appear under representation by their original attorney, John E. Clemmons, to join in the will contest had the Court not set aside the default judgment entered against them (R., XI:21-22).

These occurrences in the November 4, 2002 hearing began shortly after the opening of the hearing, when the Court announced that it would first take up Attorney

Roger Smith's motion to withdraw. The Potts' Attorney Day objected to the withdrawal (R., XI:4), stating that unless the Court should rule there is a valid settlement (R., XI:6-7), then the case should go to trial before a jury as set for the following Wednesday, November 6, 2002 (R., XI:7-8). Attorney Day announced his clients' position that it was within the Courts power to both grant the Roger Smith withdrawal motion and approve the settlement agreement (R., XI:9, ll. 15-23).

Following these occurrences, the Court announced that the parties have a valid "settlement unless anyone objects . . . through a judicially sanctioned settlement conference . . . [done] the right way." (R., XI:25), In approving the wisdom of the settlement by those parties who agreed, the Court said:

> "If any case needs to be closed, this is one of them. And the acrimony has been just terrible. I must admit I've said on a few occasions to myself that if I could disinherit everybody in this case and give the money to the Salvation Army [not among the named charitable beneficiaries in the 1993 or 1996 wills), I would in a heartbeat. I can't say that I've been impressed with the actions of any of the litigants."

(R., XI:26, ll. 13-21).

The Court thereupon ruled that it had made the decision "establishing that this case is settled." (R., XI:27, ll. 17-18).

***Removal of Appellants' Attorney Clemmons:***

As shown in more detail in the argument, the order removing Appellants' attorney was done upon motion without any supporting affidavits, with the argumentative

statements on which the Court acted being set out in the argument (*infra,* pp.14-16), to avoid pointless duplication.

***Interested Adversaries Shares:***

For simplification, and to more clearly show the interest of each of the major adversaries, an approximation can easily be obtained by counting the principal disposable assets – as to these parties – as Decedent's Summerly Drive home,[7] as to which an inventory showed a valued at $160,700 (R., 238), and the liquid assets valued at $4,252,153.40. Inasmuch as any arbitrary figure could be adopted to show relative interests, the use of $4,000,000 for the liquid assets and $150,000 for the house, yields the following interest amounts by simple arithmetic:

| | |
|---|---|
| **Kimberly McG. Ingram** | $25,000 under the 1998 will, nothing under the 1996 or 1993 wills, $520,000 under the 1974 will, nothing as an heir at law, and $185,000 under the settlement agreement. |
| **Sonnie E. Potts** | $2,010,000 under the 1998 will, nothing[8] under the 1996 wills, $4,060,000 under the 1993 will, $260,000 under the 1974 will, $231,111 |

[7] Other real properties are shown on the inventory as having insignificant value or having Sonny E. Potts or others named in the deeds, and may accurately be disregarded.

[8] Except his interests in the low-valued properties on which his name appeared on deeds.

| | |
|---|---|
| | as an heir at law, and $1,920,000 (jointly with his wife) under the settlement. |
| **Virginia S. Potts** | $1,850,000 under the 1998 will, nothing under any of the other wills[9] or as heir at law, and $1,920,000 (jointly with her husband) under the settlement. |
| **Mary McGowan** | Nothing under the 1998 will, $2,042,500 under the 1996 wills $50,000 under the 1993 will, $520,000 under the 1974 will, $231,111 as an heir at law, and $1,120,000 under the settlement. |
| **Lucy DePriest** | Nothing under the 1998 will, $2,042,500 under the 1996 wills, $10,000 under the 1993 will, $8,667 under the 1974 will, $346,667 as an heir at law and $960,000 under the settlement. |
| **Raymond Burnett** | Nothing under the 1993, 1996, or 1998 wills, $8,667 under the 1974 will, $346,667 as an heir at law, and $15,000 under the settlement ($30,000 shared with his sister). |

[9] Except that if predeceased by her husband, Sonnie E. Potts, she would receive his entire $4,060,000 under the 1993 will.

| | |
|---|---|
| **Evie Moore** | Nothing under the 1993, 1996, or 1998 wills, $8,667 under the 1974 will, $346,667 as an heir at law, and $15,000 under the settlement ($30,000 shared with her brother). |

## IV

## Argument

**The trial Court erred in approving a settlement agreement disposing of all issues after the Appellants (Co-contestants of contested wills and co-proponents of Decedent's earliest will) had withdrawn their agreement to the settlement, and absent settlement order the Court was empowered to approve, the Court lacked jurisdiction to enter the order as a judgment.**

As shown above, the Trial Judge acted as Settlement Judge (with the consent of all parties) in a Settlement Conference conducted on October 21, 2002, then returned to his status as Trial Judge to hear at least one motion on November 4, 2002, during the course of which he acted upon a written settlement agreement derived through Settlement Conference procedures, whose events he made a part of the record by recital of the same (*supra*, pp.6-8).

Hence the November 4, 2002 hearing was based upon Settlement Conference proceedings which now came back before the same judge as Trial Judge, with settlement not having been communicated in open court but merely by telephone following a day's negotiations. Based upon the Supreme Court's earlier decision in *Harbour v. Brown*, 732 S.W.2d 598 (1987), and that Court's promulgation of

Supreme Court Rule 31 governing settlement negotiations and agreements reached under judicial oversight, this Court thoroughly expounded the governing law in *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., MS., 2000). Without unnecessary quotations, that decision held a party agreeing to such a settlement can withdraw his consent at any time before its judicial approval, which can be given only on the record in open court,[10] and that the Trial Judge has no authority to approve such a settlement unless all litigants are still in agreement to the settlement **at the time of approval** (27 S.W.3d, at 538).[11]

With this Court's determination that a party agreeing orally to any such judicially-overseen settlement may withdraw his assent as of right "because it was not made 'on the record' or 'in open court.'" (*Ibid.*, at 541), the consequence is that any post-withdrawal order approving such a settlement is without authority and "the case remains unsettled." (*Ibid.*, at 542). Hence, with telephonic post-hearing communication of consent to the Settlement Judge having been inadequate, and with it being indisputable that any "consent" given was withdrawn, before November 4, 2002, it follows that the Court's lacked legal

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[10] Holding that when an agreement is "made in the presence of the dispute resolution neutral (the settlement judge) and *not in the presence of a judge with authority to dispose of the case,* the agreement cannot be said to have taken place in 'open court.'" (27 S.W.3d at 541; emphasis added).

[11] Holding "that 'the power of the court to render a judgment by consent is dependent on the existence of the *consent of the parties at the time the agreement* **received the sanction of the court**. . .' *Harbour, 732 S.W.2d at 599*" (Bold-faced emphasis by this Court).

authority for its decision announced in open court on that date and entered in its minutes on November 14, 2002.

But Appellants insist – for good, practical, and important reasons – the order was not only without authority but it was beyond the Court's jurisdiction. Earlier decisions recognize this principle. At a time when statutes authorized a court to grant alimony only if it granted a wife the divorce, it was held to beyond a court's jurisdiction, and thus subject to collateral attack, to award alimony to a wife in a case in which the divorce was granted to the husband, *Brown v, Brown,* 198 Tenn. 600; 281 S.W.2d 492 (1955). When statutes providing for municipal annexation contests permitted only two possible decisions, either a decree upholding the annexation or one holding it void, a purported "final consent decree" making a different disposition was held beyond the Court's jurisdiction, requiring the conclusion that the ease, classified as closed on the trial court's docket, still remained open and subject for trial years later, so that the judgment, final in form and appearance, was not actually a valid final judgment. *City of Bluff City v. Morrell,* 764 S.W2d. 200 (Tenn., 1988)

So here, and so in any will-validity conflict in any court in Tennessee. When there is an old will, followed by a series of newer ones, each of which has a clause revoking all prior wills, as here, and they are attacked in will contest proceedings, the law authorizes only two possible outcomes: Either one of the wills is valid or all are void,[12]

[12] This is true because if each of the recent wills is void for undue influence or lack of testamentary capacity, their revocation clauses are also void, leaving the original will valid. If the most recent will is held void, but a less recent one is valid, its revocation clause will also be valid, so it will revoke the first will and all other earlier ones. So the

(Continued on following page)

so that the property may pass by law only by testamentary disposition or by intestate succession. Upon entry of a judgment admitting a will to probate, or a judgment holding there was no valid will *when death occurred,* the only possible distributions the Court has jurisdiction to direct are either in accord with a probated will or under the laws of intestate succession.

A different distribution is never possible except as it may come from shares of distributees identified as required by law, because it cannot come directly from the estate. This principal is illustrated by *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839 (1922), in which a will favoring some relatives was contested by the decedent's son, and the contest was settled by formal agreement, providing a distribution from estate assets quite different from that provided by the will. This was followed by dismissal of the will contest and then by disposition of the previously-pending proceedings to probate of the will in solemn form, now without opposition. Because the agreed asset distribution could come from no source other than legatees under the will, the son had contested the will, and the will provided, for disinheritance of any beneficiary who might contest the will, a recognized legally valid provision, this will construction case was then filed, upon stipulated facts, to determine if the contesting son was disinherited. In a very scholarly discussion (147 Tenn., at 147-156, 245 S.W. at 841-844), the Court demonstrated that Tennessee should adopt the minority exception, holding there should be no disinheritance where the beneficiary's contest was

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estate will pass under that recent will unless it be held that the valid recent will was also revoked by subsequent act, leaving the original will still revoked, resulting in intestacy.

well-grounded, because its purpose was to determine if the writing was actually the decedent's will, not "a mere vexatious act of a disappointed child or next of kin." (147 Tenn., at 152).

This fact that when agreed disposition actually differs from that required by the probated will or the intestate succession laws, whichever is applicable, its only possible source is transfer of the entitlement from those who inherited it, is confirmed by statutes. The Tennessee disclaimer statute, T.C.A. § 31-1-103, requires that for the new transferee to qualify as having received by inheritance instead of by transfer from the disclaiming heir, the transferee's entitlement must be by operation of law, *e.g.*, such interest most pass 'without any direction on the part of the person making the disclaimer" to beneficiaries determined by the statute itself, § 31-3-103(b)(4) or (c). Federal estate and gift tax law contains a similar disclaimer qualification statute to determine whether the source of the transfer is the estate itself, or from a legacy some individual beneficiary has already received from the estate, 26 U.S.C. § 2518.

The foregoing demonstrates that where court-ordered distribution is to be other than that provided by the applicable rule – either the provisions of a probated will or the law of intestate succession, then no Court has power to order it except by consent of all persons whose consent is required. Obviously, the consent required can never be less than the consent of all parties to the litigation who may possibly inherit through trial on the merits. Reason would suggest that where, as here, intestacy is possible, then consent of the non-participating heirs at law should be required for any court to have jurisdiction to order a distribution other than that required by law.

Hence, Appellants insist that the judgment was not only entered without legal authority, it, in the absence of the required consents, was entered wholly without jurisdiction, no less than were the apparent final judgments in *City of Bluff City v. Morrell* and *Brown v. Brown, supra,* p. 13..

**The trial Court erred in proceeding, as the terminal part of the settlement-approval hearing, with the first step of the will contest litigation, admitting evidence and then admitting to probate Decedent's final (1998) purported will when – (a) at the same hearing, the Court permitted Contestants-Appellants' new counsel to withdraw, and failed to continue the hearing to give Appellants time to locate and employ new counsel, and (b) in so ruling without intervention of a jury, when jury demands had been made in the will-contest petitions.**

This issue may be more academic than practical, but prudence dictates that it should be determined to safeguard against possible future insistence that the 1993 will probate evidence and order might stand alone as valid. Basically, without regard to representation and fair-trial rights, when an order based upon a settlement is achieved as done in this case, then "the case remains unsettled." *Environmental Abatement, Inc. v. Astrum R. E. Corp. v. Mahan Roofing, etc.*, 27 S.W.3d 530 (Tenn.App., M.S., 2000). As already discussed (*supra*, pp.10-11) this would seem to render the entire judgment void *ab initio,* equally invalidating that part which purported to admit the will to probate. This is no criticism of the trial court, because Appellees' counsel were all present, and either expressly consenting or not objecting to this procedure. It is always

the obligation of employed counsel to research matters before they bring them before a judge for decision.

Clearly, the purpose of hearing the testimony of witness as to Decedent's testamentary capacity and handwriting identification was not to conduct a common-form probate probate hearing, which would have been possible had all will contests previously been dismissed (see, *e.g.*, *infra,* pp.11-12), nor to commence trial of the will contest case, which was set for trial 2 days later.

Nevertheless, Appellant Burnett was present, consenting to the withdrawal of his attorney, Roger Smith,[13] insisting upon his right to his day in court, and requesting time to locate and employ other counsel.[14] As Attorney Roger Smith advised Appellant Burnett, this case is much too demanding to be handled by a single attorney (*supra,* p.7), Appellants clearly could not competently prosecute their cause *pro se* (if any human can), and Appellants should have been given time to employ counsel. *Fidelity-Phoenix Fire Ins. Co. v. Oliver,* 25 Tenn. App. 114, 152 S.W.2d 254 (Tenn.App., M.S., 1941, *Cert. den,* 1941) heavily relying upon *Brown v. Brown,* 86 Tenn. 277, 6 S.W. 869, 7 S.W. 640:

> "Where it is shown that defendant's attorney had withdrawn from the case, it is the duty of the court to continue the case a sufficient length of

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[13] Who spoke not a word for the protection of any rights of Appellants, despite the Court's comments (quoted *supra,* p.7) about his professional obligations of continued representation.

[14] The undersigned previously briefly represented Appellants' brother, John Burnett in his withdrawal from the case on June 14, 2002 (R., 705), but did not represent Appellants until shortly before December 12, 2002 (R., 1174, 1178).

> time to penult defendant to employ other counsel and to enable the new counsel to investigate the case and make defense. 13 C.J., 134, section 26; 17 C.J.S., Continuances, section 23."
>
> (25 Tenn.App., at 119, 15S S.W.2d, at 258).

Upon a direct appeal, denial of the right to counsel is surely adequate for Appellants' rescue from their predicament particularly when it was brought about by actions insisted upon by Appellees' counsel. Because of this denial, and because of the fact that the probate proceedings were conducted without a jury, although a jury had been demanded, the order admitting the will to probate should be vacated.

**The trial Court erred in removing Appellants' original counsel from participating in the case on the ground of conflict of interest, when their co-contestant, Kimberly Laura McGowan Ingram, through new counsel, filed a new will contest petition contesting the Decedent's 1998 will, but not contesting earlier wills which Appellants continued to contest, such not presenting a conflict of interest.**

It was extremely important to Appellants that they be allowed to be represented by the attorney of their choice, John E. Clemmons, who had unmatched familiarity with the complex details of this litigation through many months' representation, when the opposing litigants, as indicated by the Court's comments (*supra,* p. 8), had not been characterized by a showing of brotherly love. Although Appellants now have been compelled, twice, to employ substitute counsel, it is clear that Mr. Clemmons'

service would still be invaluable, either as counsel or as co-counsel, in trial of the case.

The ground upon which Ms. Ingram moved to disqualify her former attorney was conflict of interrest, both actual and in an "appearance of impropriety." (R., 660). This motion was unsupported by any affidavit. Her supporting brief quoted from the Disciplinary rules requiring a lawyer to discontinue "multiple employment" if representation of one might adversely affect his "representation of another client, . . . " (R., 663), which is precisely what Mr. Clemmons commendably did. Responding, Mr. Clemmons pointed out convincingly, and with considerable detail, his position that, before he assumed obligations to her, she had shared her secret knowledge with the world at large by conferences with all the other lawyers in the case (R., 666-672, particularly at 669), and that it was **she** who first made contact with him and brought Appellants to him as clients. These positions are clearly established by the record, but Ingram did not support her prayer for relief with affidavits, so as to bring facts before the court, as authorized by Rule 6.04 T.R.C.P., so there was no basis for the Court to order an evidentiary hearing. Unlike plants, courts do not gain knowledge through osmosis, but from evidence.

While a conflict in different clients' **objectives** may have impelled termination of the attorney-client relationship between Attorney Clemmons and Kimberly McG. Ingram, and while her mother, Mary McGowan, might be expected to develop hostility toward Mr. Clemmons as an opposing attorney, it seems clear there was no conflict of **interests**. An "interest" is by definition a "right, title, or legal share of something." (WEBSTER'S SEVENTH NEW COLLEGIATE DICTONARY, 1965).

Mr. Clemmons asked to withdraw from representing Ingram on April 10, 2002, because of a prospective conflict between the interests of herself, as a major legatee under the original 1974 will, and the Appellants, as minor legatees thereunder (R., 572). Ingram joined Appellants initially in attacking the 1993 will, under which *she would inherit,* though only $25,000, and also attacking the 1996 wills which favored her mother (R., 325). While she would inherit most under the 1974 will (*supra*, p.8), but the record reveals **no** petition by her to probate that will. Yet Appellants petitioned to probate that early will at 2:49 p.m. on May 17, 2002 (R., 653). Perhaps coincidentally, Kimberly McG. Ingram filed her motion to disqualify her attorney[15] Clemmons 1 hour, 20 minutes later, at 4:09 p.m on May 17, 2002 (R., 660). But Ms. Ingram acted promptly not only to file her own separate contest of the 1998 will under which she stood to inherit and the 1993 will on June 18, 2002 (R., 707), but also filed a pleading that essentially **withdrew** her opposition to the 1996 wills (*supra,* p. 4), although these wills, while heavily favoring her mother, would revoke the 1974 will and thereby **disinherit** her from the largest bequest she might receive under any possible alternative.

This record presents no conflict of **interests**, but an apparent conflict of **objectives** or **loyalties**. Mr. Clemmons has a life-long obligation to keep confidential any secrets he may have learned from Ms. Ingram in attorney-client communications. Yet the interests he advanced

[15] Still properly referred to as her attorney, because the order permitting him to withdraw as Kimberly McG. Ingram's attorney was not entered until June 11, 2002 (R., 700).

favored Ms. Ingram, but not her mother. This record presents no showing of a conflict of interest.

**The trial Court erred in applying the Tennessee Rules of Civil Procedure regarding default judgments for non-appearance to statutory will-contest proceedings.**

The problem here involved is that default judgments were entered against all heirs at law and all legatees who failed to appear in response to summonses, this occurring after the Probate Judge had temporarily recused himself and while another Circuit Judge was presiding.[16] Under probate law, jurisdiction over the estate is *in rem,* based upon the Court's control of the *res,* together with the constitutionally-required **notice**. This is distinguished from a summons, which is a command to appear, essential in every *in personam* case.

This is recognized by T.R.C.P., Rule 66, which states in pertinent part:

> " . . . The practice *in the administration of estates* by receivers or by other similar officers appointed by the Court shall be in accordance with the statutes of this state and with the practice heretofore followed in the courts of this state. In all other respects, an action in which the appointment of a receiver is sought or which is brought by or against a receiver shall be governed by these rules."

[16] The Probate Judge made it clear that only the will contest matters were transferred for trial, not the entire probate case. (Transcript, R., X:pp. 3-10).

The nature of the probate in solemn form was authoritatively described in *Lillard v. Tolliver*, 154 Tenn. 304, 285 S.W. 576 (Tenn., 1926), in which the Supreme Court said:

> "In the case of Davis v. Baugh, 1 Sneed, 477, Totten, Judge, in passing upon the rule of law in regard to the age of an infant who could make a will, says:
>
> > 'It is true that this rule, derived originally from the Civil Law, is the rule of the English ecclesiastical courts having jurisdiction of the subject of wills and intestates' estates. . . .'
>
> * * *
>
> "[7] Probate proceedings are not strictly suits with parties plaintiff and parties defendant, where the plaintiffs demand judgment against the defendants, They have, from time immemorial, been declared to be proceedings in rem. The purpose of such proceedings is to determine upon the disposition of the property of decedents, to apply it in an orderly way to the payment of debts, and to distribute the remainder to those entitled to receive it either by will or under the statutes of descent and distribution. Such proceedings are more akin to bills filed to administer the estates of insolvent corporations, or bills in the nature of general creditor's bills, or similar to proceedings in admiralty; similar also to the statutory proceedings in reference to the enforcement of mechanics' liens claimed upon real property. In each one of these proceedings, all persons are permitted to intervene and become parties who assert rights to the property itself.
>
> (285 S.W. at 578)

In making the Rules of Civil Procedure applicable to all civil actions, the Advisory Committee made reference to former title 20, as referring to "actions at law," T.C.A. former § 20-201, but that entire title, referring to the course of trial of ordinary litigation, did not concern itself with special statutory remedies, such as will contests, mandamus, and others always controlled by unrepealed statutes.

Soon after the adoption of the rules of civil procedure, a statutory procedure was filed, in which the statute simply followed the then-existing chancery procedures, anticipating trial only upon depositions, and the Supreme Court held such trials were abolished by the rules, *Hunter v. Bowman*, 535 S.W.2d 853 (Tenn., 1976), but added a thoughtful proviso – "We caution that *this decision is not to be construed as a blanket holding that the Tennessee Rules of Civil Procedure will prevail over seemingly inconsistent provisions of statutory law.* In this vital procedural area, having no substantive aspects, we simply hold that it is our belief that the Legislature, by the adoption of the Rules, intended to finally and forever abolish trials by deposition except to the limited extent exempted from the application of the Rule." (535 S.W.2d at 854; emphasis added.)

More recently, it was held that the Rules of Civil Procedure must yield to the special statutory procedure for enforcing foreign judgments, so that mandamus should issue to compel the Clerk of the Court to issue execution 30 days after service of summons, even though no default judgment had been entered as required by the Rules of Civil Procedure for execution, *Avanta Businesse Services Corp. v. McPherson, et al.*, 2000 Tenn. App. LEXIS 242 (W.S., 2000).

The clear basis of jurisdiction and nature of will proceedings was made clear in *Petty v. Call,* 599 S.W.2d 791 (1980):

> "Since statehood our cases have consistently held that a will contest is a proceeding in rem, and the res being the estate of the deceased, all persons who have any just or colorable claim, in the event of testacy or intestacy, have a right to become, parties, but failing to do so they are bound by the result, which is conclusive upon all the world. *E.g. Jones v. Witherspoon, 182 Tenn. 498, 187 S.W.2d 788 (1945); Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576 (1926); Larus v. Bank of Commerce & Trust Co., 149 Tenn. 126, 257 S.W. 94 (1923); Fry v. Taylor, 38 Tenn. 594 (1858); Patton v. Allison, 26 Tenn. 320 (1846); Hodges v. Bauchman, 16 Tenn. 186 (1835); Arnold v. Marcom, 49 Tenn. App. 161, 352 S.W.2d 936 (1961).*"
>
> (599 S.W.2d, at 793)

The court also made very clear the status of heirs or legatees who might choose not to participate:

> "A will contest may be brought by any one interested party, and *all other interested parties are free to join the contestant, join the proponent, or stand aloof.* Those who are cast in the litigation may settle, if they do so in good faith, but any compromise of the contest will not inure to the benefit of the non-participating heirs, but on the other hand, if trial of the issue results in an adjudication that the will is invalid, the non-participating heirs take their respective shares of the intestate decedent's estate.
>
> (599 S.W.2d, at 796; emphasis added).

It is only in actions *in personam* that a summons, or command to appear, is the traditional and appropriate mode of exercising a state's compulsory judicial power. Although done today mainly through long-arm statutes, growing from the rationale that persons have physically acted in an area within the state's power as expressed in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 99 L.Ed. 95 (1945). The U.S. Supreme Court has reaffirmed that the power to summon one to appear, in *in personam* jurisdiction is derived from personal presence, *Burham v. Superior Court of California,* 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).

Hence, a will contest case presents no basis or need for a compulsory summons or order to appear, but merely for notice, which assures that an heir may appear or not if he wishes, more in the nature of an invitation than a command. As held in *Petty v. Call,* 599 S.W.2d 791 (1980) (discussed *supra*, p. 18), the heir has a **right** to "stand aloof" and either intervene or not, without danger of a default judgment.

## V.

## Conclusion

It is respectfully submitted that the judgment of the Probate Court should be reversed, and the matter be remanded for trial on the merits, that the order disqualifying Appellants' former attorney Clemmons be reversed with directions that he be permitted to participate in trial, at least in a consulting capacity if not actual trial advocacy, and that the Court clarify the law as to the nature of will probate and contest proceedings, with control of the

estate's assets and notice rather than summons as the basis of jurisdiction.

Respectfully submitted,

/s/ Carrol D. Kilgore
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# APPENDIX 2

**Tennessee Court of Appeals**
**Brief of Appellees**
**Sonnie E. Potts et al.**

**IN THE TENNESSEE COURT OF APPEALS**
**FOR THE MIDDLE SECTION, AT NASHVILLE**

| | | |
|---|---|---|
| **IN RE: ESTATE OF ERIN MURRAY JONES, DECEASED** | ) | **No. M2002-03073-COA-R3-CV** |
| | ) | **Davidson County Circuit Court, Part VII, No. 98P-1344** |

**ON APPEAL FROM JUDGMENT OF THE DAVIDSON COUNTY CIRCUIT COURT, PROBATE DIVISION**

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# Brief of Appellees
**Sonnie E. Potts and Virginia S. Potts**
**Mary McGowan, Lucy DePriest, Kimberly Ingram, Sonnie Levi Potts, Carol Ann Potts, Kevin L. Ingram, Jr. And Mary Madeline Ingram, minors**

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**Attorney for Sonnie E. Potts &
Virginia S. Potts, Appellees
See Additional Counsel Following**

## STATEMENT OF THE ISSUES

1. **Whether the trial court acted appropriately in entering judgment consistent with the terms of the parties' settlement agreement.**

2. **Whether a conflict of interest precludes Appellants' original counsel from continuing to represent them in this matter.**

3. **Whether the trial court correctly applied the Tennessee Rules of Civil Procedure to enter default judgment against certain heirs and legatees who declined, after notice, to participate in this will contest and, in any event, whether Appellants suffered no harm as a result of the entry of default against them, and whether this is even a proper issue on appeal.**

## STATEMENT OF THE CASE[1]

As did Appellants, Appellees will limit this Statement of the Case to those procedural events most pertinent to the issues raised on appeal.

This is a will contest. The decedent, Erin Murray Jones, died August 18, 1998 (R.1). Ms. Jones was unmarried and

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[1] Hereinafter, "R" refers to the Record on appeal. "T" refers to the transcript of the proceedings before the trial court on November 4, 2002 which transcript is included with the Record and was incorporated by reference into the final Order of the trial court entered November 14, 2002 (R. 1150).

left no children (R.1). Ms. Jones' heirs at law were her twelve surviving nieces and nephews (R.1).

On September 2, 1998 two identical wills of Ms. Jones executed June 4, 1996 and October 28, 1996 were offered for probate in solemn form by nieces Mary McGowan and Lucy DePriest (R.1). Next of kin and beneficiaries named in the wills were served with notice of the solemn form proceeding (R.1).[2]

On September 11, 1998 Sonnie E. Potts and others filed an objection to the petition to probate the 1996 wills (R.13). Sonnie E. Potts and Virginia S. Potts also filed a petition to probate in solemn form the January 12, 1998 holographic will of Erin Murray Jones (R. 15, 20). Again beneficiaries and next of kin were served with notice (R.15, 20).[3]

On October 20, 1998 Mary McGowan and Lucy DePriest filed a complaint contesting the January 12, 1998 will of Erin Murray Jones (R. 26). Legatees and devisees as well as the next of kin/heirs at law were served with notice (R. 26).

Thereafter, Sonnie E. Potts and Virginia S. Potts, as proponents of the 1998 will, and Mary McGowan and Lucy DePriest, as proponents of the 1996 wills undertook discovery and prosecution of this will contest.

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[2] Appellants anticipate filing a Motion to Supplement the Record to include these notices. Appellants do not anticipate any opposition to the Motion.

[3] Appellants anticipate filing a Motion to Supplement the Record to include these notices. Appellants do not anticipate any opposition to the Motion.

On February 17, 1999, Jerry Scott, then counsel for Lucy DePriest and Mary McGowan filed a motion for entry of default judgment against certain heirs at law and legatees/devisees who had been served with notice of the proceedings but had failed to take any action to join the litigation (R. 64). The motion also requested the court appoint a guardian ad litem for minor legatees. The motion was granted by order entered November 24, 1999 (nunc pro tunc to April 16, 1999) (R. 255).

On December 22, 1999 Appellants (along with their brother John Burnett and Appellee Kimberly Ingram) filed a motion to set aside the default judgment entered against them (R. 282). The motion was granted by ordered [sic] entered July 6, 2000 (R. 313).

On February 11, 2002 Sonnie E. Potts and Virginia S. Potts offered for probate in common form the 1992 will of Erin Murray Jones (R. 423). Objections to that probate petition were filed by Kimberly Ingram on May 31, 2002 (R. 684) and Appellants on June 5, 2002 (R. 692). An amended answer was filed by Appellants on June 6, 2002 (R. 697).

Counsel for Appellants John Clemmons filed a motion to withdraw as counsel for Kim Ingram on April 10, 2002 stating as grounds a prospective conflict as a result of Ms. Ingram's intent to offer the 1974 will of Erin Murray Jones for probate (R. 572). The motion was granted by order entered June 11, 2002 (R. 700). Mr. Clemmons was later disqualified as counsel for his remaining clients (the Appellants) on motion of Kimberly Ingram entered June 21, 2002 (R. 710).

On May 17, 2002 Appellants offered for probate in common form the 1974 will of Erin Murray Jones (R. 423).

An objection was filed by Sonnie and Virginia Potts (R. 676).

This matter was scheduled for trial on November 2, 2002 and a pretrial conference on October 21, 2002. On October 18, 2002 counsel for Kimberly Ingram notified the trial court by letter that all parties to the will contest other than Appellants had reached an acceptable compromise and settlement of their interests (R. 1204). The letter requested that the court convert the pretrial conference into a settlement conference. With the agreement of all parties, through counsel, the trial court conducted a settlement conference an October 21, 2002 (R.1204). The following day, the trial court and Appellees were notified by counsel for Appellants of Appellants' acceptance of Appellees offer to settle the case (T. 10-12, 16).

On November 1, 2002, counsel for Appellants, Roger Smith, filed a motion to withdraw as counsel stating as grounds that he had been notified that day that Appellants intended to withdraw their consent to the settlement agreement (R. 1145). The trial court heard counsel's motion on November 2, 2002, the date originally scheduled for the trial of this matter. The trial court also heard the oral motion of Appellees to enforce the settlement agreement between the parties (T.1-8).

At the conclusion of the hearing on November 2, 2002, the trial court granted Mr. Roger Smith's motion to withdraw as counsel for Appellants (R.1150). The trial court also granted Appellees' motion to enforce the parties' settlement agreement, finding that the agreement was a binding, enforceable contract between the parties (R. 1150). Consistent with the terms of the parties' settlement agreement, the trial court then heard proof of the validity

of the 1998 holographic will and admitted that will to probate, subject to the terms of the settlement agreement (R.1150). The trial court's order admitting the 1998 will to probate subject to the terms of the settlement and dismissing this will contest was entered November 12, 2002. (R. 1150).

## STATEMENT OF FACTS

As did Appellants, Appellees will attempt to limit this Statement of Facts to those most pertinent to the issues on appeal. A discussion of the facts pertinent to disqualification of John Clemmons as counsel for Appellants is included in that portion of the Argument.

Erin Murray Jones died August 18, 1998 (R. 1). During her lifetime, Ms. Jones amassed and managed an estate in excess of $8 million dollars (R.238), Ms. Jones was never married and left no children (R.1). Her heirs at law at the time of her death were her twelve surviving nieces and nephews (R.1).

This will contest involves five wills executed by Erin Murray Jones over a twenty-four year period. A copy of each of these wills is attached to the corresponding petition to probate (R. 1, 15, 20, 423, 653). Appellants also provide a brief summary of each will in their Statement of Facts.[4]

Appellants Raymond Burnett and Evie Moore have a peripheral interest, at best, in this litigation. They were listed as beneficiaries in only the 1974 will and, would

[4] Appellees do not agree with the estimated Interested Adversaries Shares included in Appellants' brief.

inherit only a 2.08% share of the estate pursuant to that 1974 will (R.653). The only other way Appellants could inherit more from Ms. Jones' estate is if all five wills at issue in the will contest executed over a twenty-four year period were deemed invalid.

In contrast, Appellees have a much more substantial interest in the Estate of Ms. Jones under any possible scenario. Sonnie and Virginia Potts are the primary beneficiaries under the 1998 and 1993 wills (R.15, 20, 423). Sonnie Potts is also a beneficiary under the 1974 will (653). Mary McGowan and Lucy DePriest are the primary beneficiaries of the 1996 wills and also take under the 1993 and 1974 wills (R. 1, 423, 653). Kimberly Ingram is named as a beneficiary in the 1998 and 1974 wills (R.15, 20, 653). All but Kim Ingram also take an equal one-twelfth share under the laws of intestacy (R.1).

As this Court can surmise from the record, this has been a hotly contested matter. Settlement among the principal beneficiaries was not easily achieved. Nonetheless, by the time scheduled for the pre-trial conference on October 21, 2002 all principal beneficiaries of Ms. Jones' estate who were parties to this will contest under the five wills at issue, were able to come to an agreement as to settlement (R. 1204).

Prior to the pre-trial conference, Appellees advised the trial court by letter that they had reached a settlement amongst themselves and wished to proceed to a settlement conference rather than a pre-trial conference in an effort to reach an agreement with Appellants (R.1204). Appellees explained their concern over the great expense of going to trial. Counsel for Appellants agreed to the settlement conference and also agreed that the trial judge could serve

as settlement judge for purposes of the meeting (T.10). Thereafter, counsel and the court entered into a series of settlement discussions which resulted in a total offer of $30,000 toward reimbursement of legal expenses to Appellants (T.10-11). After several rounds of discussion, the conference was adjourned. Counsel for Appellants requested an opportunity to confer with his client's over the phone that night or the next morning regarding the settlement offer from Appellees (T. 10-11). The Court offered to participate in counsel's call with his clients, but counsel declined. *Id.* Appellees also requested at that time that the Court require the in-person attendance of Appellants, who reside in Florida, for further settlement negotiations (T.12). The Court declined to require Appellants to travel out of their home state for the time being. *Id.*

The next day counsel for Appellants called John A. Day, counsel for Appellees Sonnie and Virginia Potts, and accepted Appellees settlement offer on behalf of Appellants (T.5-6, 10-12). Counsel for Appellants also called the trial court and advised of his clients' agreement to settle on the terms offered the previous day by Appellees. *Id.* The trial court then contacted John A. Day to confirm all parties' consent to the settlement agreement. *Id.* Thereafter, the trial court and all parties acted in reliance on Appellants' acceptance of the settlement agreement (T. 5-8). The trial court even scheduled other matters on its docket for those days originally reserved for the will contest trial (T. 25-27).

On November 1, 2002, the day before this matter was scheduled for trial, counsel for Appellants filed a motion to withdraw stating that his clients intended to withdraw their consent to the settlement agreement (R. 1145). Believing his clients to have entered into a binding settlement agreement which they now refused to honor, Appellants'

counsel deemed himself to be in a position of conflict and therefore moved the trial court to be allowed to withdraw as counsel of record for Appellants (R. 1145).

On November 2, 2002 counsel for all parties appeared before the Court (R. 1150). Counsel for Appellants moved the Court to enforce the settlement agreement previously sanctioned by the trial court and enter judgment thereon (R. 1150). Appellee Raymond Burnett appeared before the trial court in person at that hearing and acknowledged the [sic] he and his sister Evie Moore had agreed to the terms of the settlement agreement and also gave permission to their counsel to convey their acceptance to the trial court and Appellees (T. 17-24). Mr. Burnett confirmed in his statements to the trial court that there was no confusion as to the terms of the settlement or their actions in accepting the settlement, but that he and his sister had simply changed their minds (T. 17-24).

The trial court granted Mr. Roger Smith's motion to withdraw as counsel for Appellants (R. 1150). The trial court also held that Appellants had in fact entered into a binding settlement agreement that was sanctioned by the court prior to their attempt to withdraw consent (R. 1150). The trial court further ruled that the settlement contract was an enforceable contract under Tennessee law (R. 1150). The trial court next heard evidence on the issue of the validity of the 1998 will and admitted that will to probate subject to the terms of the parties' settlement agreement (R. 1150). The will contest was dismissed (R. 115).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT CONSISTENT WITH THE TERMS OF THE SETTLEMENT AGREEMENT.

#### A. THE TRIAL COURT ACTED APPROPRIATELY IN APPROVING THE SETTLEMENT AGREEMENT OF THE PARTIES AND ENTERING JUDGMENT ACCORDINGLY.

1. The settlement agreement received the sanction of the trial court prior to Appellants' attempt to withdraw consent.

The trial court's approval of the settlement and entry of judgment accordingly was entirely appropriate because the settlement agreement between the parties was announced to the trial judge and received the sanction of the court well before Appellants' attempt to withdraw their consent to the agreement.

Tennessee law sets forth a framework of principles to be applied by a court in determining whether a settlement agreement should be enforced in the face of a party's attempt to withdraw consent. Essentially, pursuant to these principles, a settlement is enforceable once it has been sanctioned by that court with the authority to dispose of the case (generally the trial court and not a judge assigned the case for settlement purposes only or other Rule 31 neutral). *See generally Harbour v. Brown,* 732 S.W.2d 598 (Tenn. 1987); *REM Enterprises, Ltd. v. Frye,* 937 S.W.2d 920 (Tenn. Ct. App, 1996); *Environmental Abatement, Inc. v. Astrum R.E. Corp.,* 27 S.W.3d 530 (Tenn. Ct. App. 2000); *Moxham v. Crafton,* No. M2000-00803-COA-R3-CV, 2001 WL 468669 (Tenn. Ct. App. May 4, 2001) (No Tenn. R. App. P. 11 application filed). Additionally, the terms of the settlement must be sufficiently

clear to be enforceable. *Id.* These principles are clearly met in the present case.

Mr. Raymond Burnett, on his own behalf and on behalf of his sister, appeared before the trial court in person on November 2, 2002 and acknowledged to the trial court that there was no dispute as to the terms of the settlement agreement and that he and his sister had accepted those terms and given authority to their counsel to convey that acceptance to the trial court and Appellees (T. 17-24). That acceptance was conveyed to Appellees and sanctioned by the court on October 22, 2002 (T. 10-13, 25-28). The trial court even relied upon the parties' agreement and scheduled other matters on the trial court's docket for the time originally reserved for the trial of the will contest (T. 25-28).

Yet, Appellants argue that, despite these undisputed facts, this Court should reverse the trial court's order enforcing the settlement of this matter because judicial sanction of the settlement was not given "on the record" in "open court" before Appellants' withdrawal of consent. Appellants base this argument on a very narrow application of the opinion of the Tennessee Supreme Court in *Harbour* and the opinion of this Court in *Environmental Abatement.* Other appellate court opinions interpreting and applying the *Harbour* and *Environmental* opinions, however, clarify that those opinions are not to be applied so rigidly to any and all sets of facts.

In *REM Enterprises, Ltd. v. Frye,* for example, the Eastern Section of this Court explained that a trial court may be deemed to have sanctioned a settlement agreement even though the court has not yet entered a written judgment thereon, *Frye,* 937 S.W.2d at 921-922. Thus, in

*Frye,* the trial court was deemed to have sanctioned the settlement agreement once the agreement was read to the court and the parties acknowledged their agreement to the Chancellor even though the Chancellor did not enter a written judgment for almost three months, well after the defendant attempted. to withdraw consent to the agreement.

In *Moxham v. Crafton,* this Court again addressed what it means for a settlement to receive the "sanction of the court". In *Moxham,* the parties reached a resolution of their construction dispute in the hallway of the courthouse during trial. The parties then reentered the courtroom and announced their settlement to the court, which the court approved. Thereafter, counsel for the parties submitted to the court a draft agreed order signed by counsel for both parties reciting the terms of the agreement. However, one of the parties withdrew its consent to the agreement before the order was entered. The trial court enforced the settlement and this Court affirmed. In so holding, this Court relied upon language adopted by the Supreme Court in *Harbour* explaining that a settlement agreement may receive the sanction of the court without a judgment having been entered thereon:

> The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court *or* is rendered and promulgated as a judgment. (emphasis added)

*Moxham,* 2001 WL 468669 at *4 (quoting *Harbour* and *Frye*).

This Court explained in *Moxham* that "[t]he disjunctive 'or' in the above quote indicates that while simultaneous agreement by the parties and the court is a necessary prerequisite for a valid agreed order, that agreement may adequately manifest itself when the parties are before the court, even if a valid judgment has not yet been. entered." *Id.*

This Court also rejected the *Moxham* appellants' argument that, since there was no transcript or recording of the proceeding, the actual agreement of the parties was not "on the record" and thus did not meet the requirements of Tennessee law as established in the earlier opinions of *Harbour* and *Environmental Abatement.* This Court explained that the purpose of having a record is to ensure no dispute as to the terms of the agreement and where there is no dispute a technical "transcript" is immaterial to enforceability:

> [T]he purpose of transcribing a hearing during which a settlement is approved is to prove the terms of the agreement, and the parties' assent to those terms. Further, a close look at *Environmental Abatement* demonstrates a more expansive understanding of when proceedings may be considered to be "on the record" than the appellant suggests. . . .
>
> Where, there can be no dispute that agreement as to the terms existed at the time the agreement was accepted or approved by the court (which has the authority to dispose of the case), there is no basis for preventing entry of the order simply because a party changed his or her mind before the order was actually entered. A party seeking to set aside an agreed order at that point would have to rely on Rule 59, 60, Tenn.R.Civ.P., or other

> authority. Neither *Harbour* nor *Environmental Abatement* allows them to avoid the consequences of an agreement announced in open court and approved by the trial judge. (citations omitted)

*Id.* at *5.

As in *Moxham,* there is no dispute in the present case as to the terms of the settlement. Nor do appellants deny that they consented to the settlement agreement and allowed their attorney to convey that consent to the trial judge. Under these circumstances, it is simply not material that a court reporter was not present to take down the terms of the settlement and the parties consent thereto at the time the consent was sanctioned by the trial court.

Likewise, Appellants argument that the settlement agreement is unenforceable because Appellants' assent was not conveyed in "open court" is another attempt to place form over substance. There was an agreement that was sanctioned by the court with authority to dispose of the case before withdrawal of consent. It should not matter that this sanction was given over the phone during Appellants' counsel's call to the trial court and the trial court's call to Appellees' counsel, particularly when counsel had been before the Court the previous day. In fact, the trial court did not require Appellants to appear in person at the request of their counsel and for their convenience due to their out of state residence (T.12). The trial court and Appellees should not now be faulted for allowing Appellants this concession, particularly when there is no dispute that an agreement existed at the time the trial court was notified.

Both *Harbour* and *Environmental Abatement* are factually distinguishable from *Frye, Moxham,* and the case at bar with regard to these basic principles. In *Harbour,* the parties entered into a settlement agreement on the day of trial and announced the fact of settlement to the court but did not announce the terms. *Harbour v. Brown* 732 S.W.2d at 599. Thereafter, before entry of an order, one of the parties withdrew consent, taking the position that the settlement had been "tentative" and based upon the action of a third party. *Id.* The trial court and Court of Appeals declined to let the defendant out of the settlement and dismissed the case. *Id.* On appeal, however, the Supreme Court reversed the decision of the trial court, finding that the consent to the settlement was withdrawn by defendant before the trial court had an opportunity to sanction the agreement. *Id.* at 600.

In *Environmental Abatement,* this Court did not affirm the trial court's enforcement of the settlement, primarily because the parties assent to the settlement had not been presented to the trial court before being withdrawn, but rather was presented to a Rule 31 neutral who did not have authority to dispose of the case. *Environmental Abatement,* 27 S.W.3d at 540-541. Additionally, the withdrawing party disputed that the Court's final order accurately reflected the agreement between the parties. *Id.*

Unlike *Harbour* and *Environmental Abatement,* there is no dispute as to the terms of the settlement agreement in this case. There is no dispute that Appellants agreed to the settlement. There is no dispute that this agreement was conveyed to the trial court and received the sanction of the trial court before acceptance was withdrawn. There

is no dispute that the trial court and Appellants relied upon Appellees' agreement to the settlement.

What we have here is a case of settlers' remorse. Appellants simply changed their mind and want to back out of a binding settlement agreement. To allow Appellants to do so would undermine the reliability of the ADR process and would be contrary to current Tennessee law.

2. Appellants' jurisdictional argument is without merit.

Appellants argue that the trial court was without jurisdiction to enter judgment based upon the settlement agreement without the consent of all parties who might possibly inherit through trial on the merits. Thus, Appellant claims that the Court was required to obtain the consent of even those heirs and legatees of Erin Murray Jones who never made any appearance in this will contest before accepting the settlement agreement as the judgment of the court. This simply is not the law.

In *Petty v. Call* the Tennessee Supreme Court expressly held that notice to interested persons is not required upon the filing of a will contest. Nor is notice (and thus, consent) required of the settlement of that contest. Therefore, the trial court's admission of a will to probate pursuant to a settlement agreement between parties to a will contest was deemed appropriate even though heirs who would have taken part of the estate of the decedent if the will were deemed invalid were not given notice of the will contest or the settlement. The Supreme Court explained:

> [A]ll persons who have any just or colorable claim in the event of testacy or intestacy, have a

> right to become parties, but to do so they are bound by the result, which is conclusive upon all the world. . . .
>
> it is said that notice is served upon the thing itself and that thereby all persons interested are presumed to have notice because it is a part of common prudence for all persons who have an interest in the property to guard that interest by persons who are in a situation to protect it.

*Petty v. Call,* 599 S.W.2d 791, 793 (Tenn. 1980) (citations omitted).

See also *Mallicoat v. Poynter,* 722 S.W.2d 681 (Tenn. Ct. App. 1986) (holding plaintiff was not entitled to contest will and was bound by previous determination of validity of will in previous will contest even though he did not receive any notice of prior proceedings).

It should be noted that the heirs and legatees of Erin Murray Jones were given notice of the petitions to probate and only those before this Court on this appeal have chosen to participate. Notwithstanding the foregoing, Tennessee law did not require notice or consent of those persons before the trial court could approve the parties' settlement agreement and certainly was acting within its jurisdiction in doing so.

### B. THE TRIAL COURT CORRECTLY HELD THAT THE SETTLEMENT AGREEMENT IS AN ENFORCEABLE CONTRACT.

Even if the trial court had not sanctioned the parties' settlement agreement prior to Appellants' attempt to withdraw their consent, the trial court's enforcement of

the agreement and entry of a judgment thereon would still have been appropriate because the trial court expressly found that the settlement agreement was an enforceable contract under Tennessee law. In *Harbour* the Supreme Court acknowledged that a compromise agreement is first and foremost a contract, subject to being enforced as other contracts. *Harbour v. Brown,* 732 S.W.2d at 600. Thus, even if one of the parties withdraws consent to the agreement prior to the trial court's sanction of the agreement preventing the court from entering a consent judgment, the settlement agreement may still be enforceable under principles of contract law.

In *Persada v. Persada* the Eastern Section of this Court affirmed the trial court's enforcement of a settlement agreement as an enforceable contract between the parties even though, under the *Harbour* analysis, the court deemed entry of a consent judgment inappropriate. *Persada v. Persada,* No. E2002-00397-COA-R3-CV, 2002 WL 31640564, *2 (Tenn. App. November 22, 2002) (No Tenn. R. App. P. 11 application filed). The parties in *Persada* entered into a written agreed property settlement through court-ordered mediation, but before the fact or terms of settlement could be presented to the trial court the husband withdrew his consent to the agreement. The wife filed a motion to enforce the agreement.

Both the trial court and the Court of Appeals agreed that, under the *Harbour* analysis, entry of a consent judgment was inappropriate as the husband withdrew consent to the agreement before it received the sanction of the court. *Id.* The Court of Appeals also agreed with the trial court, however, that the trial court could, "in an exercise of judicial economy" elect to determine the validity of the mediated agreement and enforce that agreement

pursuant to principles of contract law. "Accordingly, a valid agreement formed a basis for the entry of the Judgment, as entered by the Trial Court." *Id. See also Beaman Pontiac Co. v. Gill,* No. M1999-006660-COA-R3-CV, 2000 WL 502822 (Tenn. Ct. App. April 28, 2000) (No Tenn. R. App. P. 11 application filed) (holding that a trial court has inherent authority and equitable power to enforce contracts of settlement concerning the subject matter of a suit before it and it is not necessary to file a separate action); *Bowater North America Corp. v. Murray Machinery, Inc.,* 773 F.2d 71, 76 (6th Cir. 1985) ("There is no doubt that the court has the inherent authority and equitable power to enforce agreements in settlement of litigation before it, even if that agreement has not been reduced to writing.") (citing *Odomes v. Nucare,* Inc. 653 F.2d 246, 252 (6th Cir. 1981); *United States v. Scholnick,* 606 F.2d 160, 166 (6th Cir. 1979)); *Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1987). Similarly, in the case at bar, it was within the sound discretion of the trial court and an appropriate exercise of judicial economy for the court to determine the validity of the settlement agreement as an enforceable contract under Tennessee law and enter judgment accordingly.

The trial court also was correct in its finding that the settlement was an enforceable contract under Tennessee law. Even though the actual written settlement document was not signed by Appellants, Raymond Burnett confirmed under oath on November 2, 2002, that he and his sister Evie Moore had agreed to accept a total of $30,000 in full and final settlement of their claims in this will contest.[5]

[5] Evie Moore did not appear in person on November 2, 2002, even though, if the settlement agreement had not been enforced, the trial court could have ordered the parties to move forward with the trial of

(Continued on following page)

Mr. Burnett confirmed that there was a meeting of the minds between the parties and that there was no dispute as to the terms of the contract. Appellants' counsel also confirmed their agreement to settle and the terms in his motion to withdraw.[6] Mr. Burnett and Ms. Moore simply changed their minds after entering into the agreement. Under these circumstances, the trial court did not err in finding that the parties had entered into a binding contract for settlement and enforcing same. "A settlement agreement is merely a contract between the parties to the litigation . . . As such formation, construction, and enforceability of a settlement agreement is governed by local contract law." *Sweeten v. Trade Envelopes, Inc.,* 938 S.W.2d 383 (Tenn. 1996). A contract may either be express or implied, written or oral, so long as there is a meeting of the minds of the parties in mutual assent to its terms, sufficient consideration, and it is free from fraud, undue influence, not against public policy, and is sufficiently definite to be enforced. *Johnson v. Central National Insurance Co. of Omaha, Nebraska,* 356 S.W.2d 277, 281

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this matter. Ms. Moore should not now be allowed to use her absence to her advantage. Even though she was not present to testify on November 2, 2002, her brother and co-Appellant Raymond Burnett confirmed that there was no dispute as to the terms of the settlement agreement and also confirmed that he and Ms. Moore accepted that agreement at the time their acceptance was conveyed to the trial court. Roger Smith also confirmed these facts in his Motion.

[6] "Where a client gives express authority to an attorney to compromise a suit, the attorney's agreement to settle within those terms will bind the client" *Pressgrove v. Burns,* No. 02A01-9507-CH-00154, 1996 WL 524137, *2 (Tenn. Ct. App. Sept. 13, 1996) (Perm. to appeal denied February 3, 1997). Mr. Smith's statements regarding the settlement negotiations and Appellants' acceptance thereof also constitute a judicial admission. *See First Tennessee Bank v. Mungan,* 779 S.W.2d 798, 801 (Tenn. Ct. App. 1989).

(Tenn. 1962); *Jamestown on Signal, Inc. v. First Federal Savings & Loan Assoc*, 807 S.W.2d 559, 565 (Tenn. Ct App. 1990). *See also Moffett v. Carman,* No. 01-A-01-9501-CH00007, 1995 WL 322642, *3 (Tenn. Ct. App. May 26, 1995) (No Tenn. R. App. P. 11 application filed) (citing *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3rd Cir. 1971)) for the proposition that a voluntary agreement to settle a lawsuit is binding whether or no made in the presence of the court and even in the absence of a writing); *Audubon Parking Assoc. Ltd., v. Barclay and Stubbs, Inc.*, 626 A.2d 729, 733 (Conn. 1993) ("A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous."); *Montgomery v. Smith*, 499 A.2d 444, 445 (Conn. 1985) (enforcing oral agreement to settle even though one of the parties repudiated before the agreement was put on the record in open court); *DAP Financial Management Co. v. MORFAM Electric, Inc.*, 755 A.2d 925, 927 (Conn. App. 2000) (enforcing settlement agreement under contract law even though agreement was not announced in open court before one party attempted to withdraw consent).

### C. THE ENFORCEABILITY OF SETTLEMENT AGREEMENTS REACHED THROUGH ADR IS CRITICAL TO THE EFFECTIVENESS OF THAT MECHANISM AS A MEANS OF RESOLVING LITIGATION.

Since the opinion of our Supreme Court in *Harbour* in 1987, alternative dispute resolution has become a vital mechanism for resolving litigation expeditiously and inexpensively. Mediations, arbitrations, and settlement conferences are conducted every day throughout our state.

These litigation tools lose effectiveness, however, if parties are not bound to abide by the agreements reached pursuant thereto. Moreover, it is in no way practical to expect parties, counsel and the trial court to be available in the courtroom each time a settlement is reached so that the terms of the settlement may be immediately announced to the court in the courtroom with a court reporter. Nor is it reasonable to expect parties to incur the expense of filing a separate lawsuit to enforce a settlement reached in a pending lawsuit. In fact, the only persons who would benefit from such a rule are the attorneys who would be paid to file a new lawsuit to enforce settlements of the prior litigation.

In order for ADR to be effective at all parties and counsel must know that a settlement reached through ADR is binding from the moment of acceptance. At the very least, where, as here, a settlement is reached, there is no dispute as to the terms, the settlement is communicated to the trial judge and sanctioned by the trial judge, the trial court should be able to enforce the settlement whether through a *Harbour* type analysis or under basic contract principles.

## II. THE TRIAL COURT CORRECTLY ADMITTED THE 1998 WILL TO PROBATE SUBJECT TO THE SETTLEMENT AGREEMENT.

Because the trial court acted appropriately in enforcing the settlement agreement and entering judgment accordingly, Appellants' second issue on appeal is moot. For example, if the settlement agreement is deemed valid and binding, as Appellees believe it should, then that disposes of the issue of whether Appellants had a right for a continuance to request a new attorney (Appellants' third

attorney) since there would be no trial. However, in the event this Court reverses the decision of the trial court enforcing the settlement agreement, Appellees do not intend to take the position that the evidentiary hearing on November 2, 2002 resolves this will contest.

## III. A CONFLICT OF INTEREST PRECLUDES APPELLANTS' ORIGINAL COUNSEL FROM CONTINUING TO REPRESENT THEM IN THIS MATTER.

Appellants argue that their former counsel, John E. Clemmons should not have been disqualified as counsel for Appellants after withdrawing as counsel for Appellee Kimberly Ingram. Mr. Clemmons first entered the case as counsel for four separate contestants – Raymond Burnett, John Burnett, Evie Moore and Kimberly Ingram – by filing a motion to set aside the default judgments entered against them. Although the pleadings Mr. Clemmons filed purported to represent identical legal positions of each contestant, in truth, Mr. Clemmons' clients have disparate and divergent interests in this litigation. Over time, Mr. Clemmons came to recognize this, withdrawing as counsel for not just one, but two of the four contestants whom he originally represented.

In April 2002, John Clemmons filed a motion to withdraw as counsel for Kimberly Ingram acknowledging a conflict in his continued joint representation of Ms. Ingram and the Appellants due to Ms. Ingram's desire to offer Ms. Jones 1974 will for probate (of which she is a substantial beneficiary while Raymond Burnett and Evie Moore are only nominal beneficiaries and John Burnett is not a beneficiary at all) (R. 572). The motion was granted and Kimberly Ingram. retained new counsel (R. 700).

Soon thereafter, on May 17, 2002, Kimberly Ingram filed a motion to disqualify John Clemmons as counsel for Appellants (R. 660). As set forth in her Motion, Ms. Ingram believed that it was improper for Mr. Clemmons, in whom she had confided and trusted, to continue to represent his other clients, who had adverse interests to Ms. Ingram, in the same litigation.

The same day Ms. Ingram filed her motion to disqualify, John Clemmons filed on behalf of Appellants a petition to probate the 1974 will. Mr. Clemmons also filed a motion to withdraw this time as counsel for John Burnett, citing a conflict of interest arising from Mr. Clemmons' other clients decision to probate the 1974 will (R. 651).

In his response to Ms. Ingram's motion to disqualify, John Clemmons attempted to minimize any conflict and challenged Ms. Ingram to identify any confidences which he held of hers (R. 666). The trial court was not persuaded by Mr. Clemmons' protests and removed him as counsel for Appellants.

Appellants now argue, on appeal, a point of semantics: that Mr. Clemmons' withdrawal was not necessitated by an actual conflict of *interest* but rather a conflict of *objectives*. Appellants claim that a conflict of objectives between clients does not necessitate disqualification of counsel. Appellants also argue that Ms. Ingram placed no proof in the record to establish a conflict of interest between her and Appellants warranting disqualification of attorney Clemmons. However, at the time Ms. Ingram moved to disqualify her former counsel, the existence of a conflict was undisputed and was in fact the very basis for Mr. Clemmons' withdrawal as her counsel. The issue at the disqualification hearing was whether, based upon the

acknowledged conflict of Mr. Clemmons in representing Kim Ingram, he could continue to represent his remaining clients whose interests were adverse to Ms. Ingram. By the time of the hearing, Mr. Clemmons and Appellants had attempted to eliminate this conflict by, themselves, offering the 1974 win for probate. The trial court, however, was not persuaded by this hollow attempt to eliminate the obvious conflict presented by Mr. Clemmons' continued representation of Appellants.

Indeed, that conflict is best exhibited through Mr. Clemmons' own statements to the court in his brief in response to the motion to have him disqualified R. 666). In Paragraphs 1 and 7 of his response, Mr. Clemmons impugns the motives of Kim Ingram, his former client, in supporting certain wills in which Mary McGowan (her mother) would benefit. He claims that Ms. Ingram's true motive was to facilitate a settlement that would in essence exclude the Burnetts and Evie Moore. He alleges that Ms. Ingram's "primary interest is to see her mother be successful in this will contest even to her own detriment . . . and [supporting the 1996 wills] is merely a technique to have her mother be successful, or permit negotiations of settlement, all to the detriment of John Clemmons' clients." It is really incredible that Mr. Clemmons would make such statements while at the same time claiming the absence of a conflict between Kim Ingram and Appellants. That Mr. Clemmons would make such accusations against a former client and accuse her of taking action that injures Mr. Clemmons remaining clients proves the conflict. Even as he sought to avoid disqualification, Mr. Clemmons was digging an even deeper hole for himself and, in the process, confirming the adversity of interests between Kim Ingram and Mr. Burnett and Ms. Moore.

An actual conflict of interests, as well as the appearance of impropriety is also illustrated by Mr. Clemmons' offer in his brief not to participate in direct or cross examination of Ms. Ingram at trial. This is clearly a situation where Mr. Clemmons' duties to a former client dilute the loyalties to his other clients. Further, there is simply no legal basis to allow Mr. Clemmons, in the face of an acknowledged conflict of interest, to fashion his own remedy over the objections of his former client.

Ms. Ingram's interests' in this matter simply are not the same as Appellants. Based on Appellants' calculations in their own brief, some significant differences are that:

a) Kim Ingram takes under the 1998 will, while Raymond Burnett and Evie Moore do not;

b) Kim Ingram takes approximately $520,000 under the 1974 will, while Raymond Burnett and Evie Moore take substantially less;

c) Kim Ingram takes nothing through intestacy, while Raymond Burnett and Evie Moore would each take approximately $346,667; and

d) Kim Ingram does not challenge the 1996 wills, Appellants do.

The adversity of interests between Ms. Ingram and Appellants is also exhibited by their current conflicting legal positions with regard to the settlement agreement, as Ms. Ingram is having to spend legal fees to uphold a settlement which Mr. Clemmons' clients seek to invalidate.

Not only are Appellants incorrect in their denial of the existence of a conflict of interest, but Appellants cite no authority for their arbitrary distinction between a conflict

of *interest* and a conflict of *objectives* which is, in reality, nothing more than semantics. To the contrary, in the recent opinion *Clinard v. Blackwood,* the Tennessee Supreme Court explained that disqualification is appropriate even in the absence of an actual conflict if there is an appearance of impropriety: "The appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Clinard v. Blackwood*, 46 S.W.3d 177, 186 (Tenn. 2001). Both an appearance of impropriety and actual conflict exist in the present case.

The trial court's disqualification of an attorney is reviewed under an abuse of discretion standard. *Clinard,* 46 S.W.3d at 182. Appellants have not shown such an abuse of discretion here. In fact, the ruling of the trial court is entirely consistent with Tennessee law at the time of the motion to disqualify and current law.

The applicable ethical rules at the time the trial court ruled to disqualify Mr. Clemmons as counsel for Appellants were the Code of Professional Responsibility found in Rule 8 of the Tennessee Supreme Court Rules. The Disciplinary Rules contained therein are mandatory in character and expressly govern conflicts of interest. DR 5-105 states in relevant part:

> A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C). DR5-105(B).

The only circumstances in which such representation of multiple clients would be allowed to continue is "if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure . . . " DR 5-105 (C).

Furthermore, DR 4-101(B) provides that a lawyer shall not knowingly:

> (2) Use a confidence or secret of a client to the disadvantage of a client.
>
> (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

In addition, numerous Ethical Considerations from the former Code apply to this matter:

1) Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. EC 5-1.

2) A lawyer should not continue employment that will adversely affect the lawyer's judgment on behalf of or dilute the lawyer's loyalty to a client; this problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. EC 5-14.

3) A lawyer should resolve all doubts against the propriety of representation and should never represent in litigation multiple clients with differing interests. EC 5-15.

4) The obligation of a lawyer to preserve the confidences and secrets of the client continues after the termination of employment. EC 4-6.

Since the trial court ruled on this issue, the Supreme Court adopted new Rules of Professional Conduct. Of those, the following apply to the issue before the court:

1.7 (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after the consultation. When representation of multiple clients is a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

1.9 (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same matter in which that

person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation.

(c) Unless the former client consents after consultation, a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client.

Tennessee Supreme Court Rules of Professional Conduct.

Applying the above rules and the ruling in *Clinard* to the case at bar there is no question that Mr. Clemmons could not, after withdrawing as counsel for Mr. Ingram due to a conflict of interest, continue to represent Appellants without Ms. Ingram's consent. As evidenced by her motion to disqualify, Ms. Ingram has not provided such consent. Additionally, even had Ms. Ingram consented, which she did not, representation would have placed Mr. Clemmons in a position of conflicting loyalties as the interest of Ms. Ingram and the Appellants have become even more adverse. The trial court did not abuse its discretion in disqualifying Mr. Clemmons and its ruling should be affirmed.

## IV. APPELLANTS' CHALLENGE OF THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENTS FOR NON-APPEARANCE IS WITHOUT MERIT.

### A. APPELLANTS' CANNOT CHALLENGE THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENT FOR THE FIRST TIME ON APPEAL.

Appellants challenge the authority of the trial court to enter default judgments against heirs and legatees/devisees who failed to make an appearance in this will contest. Although Appellants moved the trial court to set aside the default judgments entered against them, which motion was granted, no one has challenged the entry of default judgment against the non-participating heirs and legatees/devisees at the trial court level. As such, this issue is improper on appeal. *See Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal . . .); *Davis v. Tennessee Department of Employment Security,* 23 S.W. 3d 304, 310 (Tenn. Ct. App. 1999).

### B. EVEN IF IN ERROR, THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENTS IN THIS WILL CONTEST PROCEEDING WAS HARMLESS.

Appellees are perplexed by Appellants' complaint regarding entry of default judgments against certain heirs at law and legatees who have chosen not to participate in this will contest. Erin Murray Jones died August 18, 1998. Probate proceedings were initiated September 2, 1998. Heirs at law and legatees/devisees were served with notice of the solemn form probate of the 1996 wills (R.1). Heirs and legatees/devisees were also served with notice of the

petition to probate the 1998 will (R. 15, 20). In 1999, after a failed attempt at mediation, attorney Jerry Scott, then counsel for Appellees Mary McGowan and Lucy DePriest moved the court to enter default judgment against certain heirs and legatees who had not appeared or taken any action with regard to the probate proceedings or will contest (R. 64). Each of these persons was served with notice of the motion for default (R. 64). Of these persons, only the Appellants Raymond Burnett, Evie Moore and their brother John Burnett (who later sought a voluntary dismissal from these proceedings) and Kimberly Ingram have ever spoken up to complain about entry of the default judgment (R. 282). On December 23, 1999, these parties moved the Court to set aside the default judgment entered against them so that they might participate in this will contest (R.282). The trial court granted Appellants' motion and set aside the entry of default against these parties and allowed them to enter into the will contest (R.313). As a result of the Appellants late appearance in the case numerous depositions were re-taken and, at their request, the trial date in this matter has been continued.

Thus, even if the trial court's entry of a default judgment against Appellants had not been appropriate under the law of this state, they can claim no harm, as the order was set aside upon their request and they have been allowed to participate fully in these proceedings. As for the heirs and legatees who have chosen not to participate in this litigation and not to challenge the entry of default, Appellants are without standing to complain.

Rule 36(b) of the Tennessee Rules of Appellate Procedure provides that "a final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a

substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Here, entry of default, even if in error, does not warrant reversal of the judgment entered pursuant to and in enforcement of the settlement agreement because there has been no proof of harm.

### C. THE TRIAL COURT DID NOT ERR IN ENTERING DEFAULT JUDGMENTS FOR NON-APPEARANCE IN THIS WILL CONTEST.

The trial court did not err in entering default judgments against certain heirs and legatees who had not appeared in the probate proceedings or will contest litigation. Without question, the Tennessee Rules of Civil Procedure apply to will contest proceedings. *See e.g. Green v. Higdon,* 870 S.W.2d 513 (Tenn. Ct. App. 1993) (applying T.R.C.P. 56 to a will contest). Among those rules, Rule 1 provides: "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." Inherent in this directive is that, a trial court may and should use the Rules of Civil Procedure to establish reasonable parameters for control of the case. Rule 55 of the Tennessee Rules of Civil Procedure allows entry of a default judgment against a party who chooses not to respond or participate in the litigation is one means of doing so.

Appellants argue that all "interested parties [to a will contest] are free to join the contestant, join the proponent, or stand aloof." Appellees agree. However, it is not unreasonable to require those parties to choose one of those positions within a reasonable period of time. Otherwise, interested persons in a will contest may choose to stand aloof while other heirs incur legal expenses during the

prosecution of the litigation only to appear at the end of the day in the face of an impending settlement or on the eve of trial to demand "a piece of the pie" or to demand that discovery be reopened and the trial postponed. Both the court and the parties to a will contest are entitled to know the universe with which they are dealing. Rule 55 allows just that.

Although Appellees could identify no Tennessee cases specifically discussing the application of Rule 55 to will contest proceedings one way or the other, its application is not inconsistent with Tennessee law regarding will contests. As noted above, Tennessee law requires persons to know and protect their property rights, particularly in the context of probate and will contests. *See Petty v. Call,* 599 S.W.2d 791, 793 (Tenn. 1980). In fact, Tennessee law has consistently held heirs bound to the findings of a will contest proceeding or settlement thereof even when the heir did not have notice of the proceeding or settlement. *Id.*

Additionally, TENN. CODE ANN. § 32-4-101 provides that, upon the filing of a will contest, the trial court may require the contestant to post a bond payable to the executor or other proponent of the will. Thereafter, all legatees or devisees must either also make bond or make known that he or she claims nothing under the will and is willing that it be set aside. TENN. CODE ANN. § 32-4-102. The effect of entry of default judgment pursuant to Rule 55 of the Tennessee Rules of Civil Procedure is really no different, in that it allows the court and the parties to the contest to know with whom they are dealing. In fact, by giving notice of the motion for default judgment to all those who had not earlier chosen to participate in the will contest, the court and the parties to this will contest went

to much greater lengths than would otherwise be required to make sure that the heirs and legatees were aware of the contest proceedings and to give them an opportunity to participate.

## CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Honorable Court affirm the trial court's entry of judgment consistent with the parties Settlement Agreement and dismiss this appeal.

Respectfully submitted,

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